TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 343.

THE STATE OF NEW JERSEY, THE MORRIS & ESSEX RAILROAD COMPANY, PROSECUTORS, PLAINTIFFS IN ERROR,

vs.

JAMES S. YARD, COMMISSIONER OF RAILROAD TAXATION OF THE STATE OF NEW JERSEY.

IN ERROR TO THE COURT OF ERRORS AND APPEALS IN AND FOR THE STATE OF NEW JERSEY.

FILED JANUARY 14, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of "the court of errors and appeals in the last resort in all causes" [SEAL.] of the State of New Jersey, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of errors and appeals in the last resort in all causes before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of New Jersey, (The Morris and Essex Railroad Company prosecutors & plaintiffs in error,) and James S. Yard, commissioner of railroad taxation for the State of New Jersey, the defendant in error, upon an assessment & valuation of certain lands & real estate of the said prosecutors made by said James S. Yard, commissioner of railroad taxation for the State of New Jersey, for the year 1873, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their
2 validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Morris & Essex Railroad Company, the said prosecutors & plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-four.

S. D. OLIPHANT,
Clerk of the Circuit Court of the United States,
District of New Jersey, Third Circuit.

Allowed by—

THEODORE RUNYON,
Chancellor, Presiding Judge of the Court of Errors and Appeals in the Last Resort in All Causes of New Jersey.

3 (Indorsed:) Supreme C't of United States. The State of New Jersey (The Morris & Essex Railroad Company. prosecutors and plaintiffs in error) v. James S. Yard, commissioner of railroad taxation of the State of New Jersey. Writ of error to the court of error & appeals of the State of New Jersey. Returnable 2d Monday in October, 1875.

REC. 343—1

The answer of the judges of the court of errors and appeals in the last resort in all causes of the State of New Jersey within named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Supreme Court of the United States in a certain schedule to this writ annexed, as within commanded.

THEODORE RUNYON,
Chancellor, President Judge C't of Errors & Appeals, &c.

4 THE UNITED STATES OF AMERICA:

To James S. Yard, commissioner of railroad taxation for the State of New Jersey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of errors & appeals in the last resort in all causes in the State of New Jersey, wherein The State of New Jersey (The Morris and Essex Railroad Company, prosecutor) is plaintiff in error, and you, James S. Yard, commissioner of railroad taxation for the State of New Jersey, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as is in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Theodore Runyon, chancellor, presiding judge of the court of errors & appeals in all causes of the State of New Jersey, this second Monday of October, in the year of our Lord one thousand eight hundred and seventy-four.

THEODORE RUNYON,
Chancellor, Presiding Judge of the Court of Errors and Appeals in the Last Resort in All Causes of the State of New Jersey.

5 (Indorsed:) Supreme Court of the United States. The State of New Jersey, (The Morris & Essex ,) plaintiff in error, v. James S. Yard, commissioner of railroad taxation, defendant in error. Citation to defendant in error. Filed October 4, 1875. Henry C. Kelsey, clerk. Served copy S. pt. 6, 1875.

On this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-five, personally appeared before me, the subscriber, a commissioner of the United States for the district of New Jersey, George M. Shipman, and makes oath that he delivered a true copy of the within citation to James S. Yard, within named, on the sixth day of September, A. D. 1875, by leaving the copy at his place of office in the city of Trenton, with a person in charge of the office, & that he has since received a letter from the said James S. Yard acknowledging the service on the sixth day of September, A. D. 1875.

GEO. M. SHIPMAN.

Sworn to and subscribed the 29 September, A. D. 1875.

J. G. SHIPMAN,
U. S. Com'r.

6 Know all men by these presents that we, Jehiel G. Shipman & Cortland Parker, of the State of New Jersey, are held and firmly bound unto James S. Yard, commissioner of railroad taxation

State of New Jersey, in the full and just sum of one thousand dollars, to be paid to the said James S. Yard, commissioner as aforesaid, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this eleventh day of August, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately at a term of the court of errors and appeals in the last resort in all causes in & for the State of New Jersey, in a suit depending in said court between The State of New Jersey, (The Morris & Essex Railroad Company prosecutor,) plaintiff in error, and the said
7 James S. Yard, defendant in error, judgment was rendered against the said The Morris & Essex Railroad Company, the said prosecutor, and the said *the said* The Morris & Essex Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James S. Yard, the said commissioner as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of October next:

Now, the condition of the above obligation is such, that if the said The Morris & Essex Railroad Company shall prosecute their said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. G. SHIPMAN. [L. S.]
CORTLANDT PARKER. [L. S.]

Sealed and delivered in presence of—
FRANKLIN M. OLDS.

Approved by—

THEODORE RUNYON,
7½ *Chancellor, Presiding Judge of the Court of Errors and Appeals in the Last Resort in All Causes of New Jersey.*

(Indorsed:) Sup. C't of the United States. The State of New Jersey, (the Morris & Essex R. R. Co.,) pl'ff in error, v. James S. Yard, com'r def't in error. Bond for supersede's. Filed August 17, 1875. Henry C. Kelsey, clerk.

8 NEW JERSEY, *ss:*

[L. S.] The State of New Jersey to Albert L. Runyon, comptroller of the treasury of the State of New Jersey, greeting:

We, being willing, for certain reasons to be certified touching a certain statement of and valuation upon certain real property owned by the Morris and Essex Railroad Company, made, certified, and returned to you by James S. Yard, commissioner of railroad taxation, in the year eighteen hundred and seventy-three, and now with you as comptroller as aforesaid, do command you that the statement and valuation aforesaid, as fully and entirely, with all things touching and concerning the same, as they remain with you, by whatever name the same may be called, to our supreme court, to be held at Trenton on the fourth Tuesday of November instant, you certify and send, together with this writ, under
9 your hand and seal, that we may further cause to be done what of right and according to the laws and constitution of this State ought to be done.

Witness Mercer Beasley, esq., chief-justice of our supreme court, at Trenton, the twelfth day of November, eighteen hundred and seventy-three.

BENJ. F. LEE, *Clerk.*

JACOB VANATTA, *Att'y.*

(Indorsed:) New Jersey supreme court. The State (the Morris & Essex Railroad Company, prosecutors) vs. James S. Yard, commissioner of railroad taxation. Certiorari. Ret'ble 4th Tuesday of Nov., 1873. Jacob Vanatta, att'y. Allowed in open court. J. D. Bedle, ju. sup. c't.

10 STATE OF NEW JERSEY,
OFFICE OF COMMISSIONER OF R. R. TAXATION,
Trenton, June 30, 1873.

To Hon. A. L. RUNYON,
Comptroller of the Treasury of New Jersey:

In accordance with my duty, I herewith submit a report of the real estate owned, used, or occupied by the several railroad companies of this State therein specified, the valuation of which appended thereto I do hereby certify to be correct to the best of my knowledge, information, and belief.

(Signed) JAMES S. YARD,
Commissioner.

* * * * * * *

MORRIS AND ESSEX R. R. COMPANY.

Hudson County, Jersey City, 2d aldermanic district:

	No. of acres.
Lying easterly of sollid filling—Piers	1.37
Water	3.79
Between bulk-head & solid filling—Piers	1.94
Water	4.82
Between line of bulk-head and original high-water mark	50.55
West of original high-water mark	8.58
11 Total No. of acres	71.05
Deduct 100 feet of road bed	2.64
	68.41

Sixty-eight $\frac{41}{100}$ acres, valued at	$1,539,225 00
Parts of three piers, valued at	170,000 00
	$1,709,225 00

Jersey City, fourth aldermanic district:

Lots Nos. 37, 39, & 40 on city map, Meadow street	$5,000 00
Lot No. 41 " "	600 00
	$5,600 00

Town of Harrison:

Lot of land, 1½ acres, at junction with N. J. Railroad	1,200 00
Tract of land, $15\frac{96}{100}$ acres, known as "borrowing pit," north of M. & E. R. R. and east of the Gilbert place, @ $1,000 per acre, & building, @ $500	16,460 00

Five $\frac{53}{100}$ acres, exclusive of streets, in East Newark, equal to 96 city lots, average value $200	19,200 00
	$36,860 00

Essex County, city of Newark:

Depot at Division street	20,000 00
Freight-house at Spring street	6,000 00
Car-house " "	10,000 00
Two-story frame building, No. 79 Spring st	1,500 00
" " " " " 74 " "	2,000 00
12 Two-story brick dwelling, No. 30 Division st	800 00
Land & coal-sheds at M. & E. R. R. ave	15,000 00
1½-story frame house, No. 70 Spring st	3,000 00
3 " brick " " 68 " "	4,200 00
2 " frame " " 66 " "	3,200 00
1½ " " " " 64 " "	3,300 00
3 " brick " " 446 Broad "	11,000 00
2 " " " " 29 Cross "	3,200 00
2 " frame stable, Ogden st., 185 feet river-front	17,000 00
2 " " house, No. 398 Ogden st	2,600 00
Building & ground " 405 " "	3,500 00
	$106,300 00

Warren County, borough of Washington:

Freight-house	$1,000 00
Passenger-depot & gangway	3,500 00
Turn-table	200 00
Trestle-works, coal-shutes, & switches	4,000 00
Two switches, north of railroad	5,000 00
Four switches, one and a half miles	30,000 00
Half a mile of double track, connecting M. & E. R. R. with Warren R. R	35,000 00
Seventy acres of land, @ $200	14,000 00
	$92,700 00

Washington Township:

About thirty-five (35) acres of land, known as the "Hess property"	2,500 00
About five acres of land, known as the "the Wyckoff lot"	1,000 00
A tract of land, known as "the Mattison lot"	600 00
	$4,100 00

13 Mansfield Township:

Five acres of land	$2,000 00
Freight-depot	1,000 00
Passenger-depot	400 00
Two water tanks	1,500 00
One cattle-pen	100 00

Eight acres of land on Cregar Hill	400 00
Three buildings ("shanties") along the road-bed	1,000 00
	$6,400 00

Borough of Hachettstown:

Passenger-depot, Main street	$2,667 00
Freight-depot	2,667 00
Engine-house	2,667 00
Lot of land, 200 f't by 900	2,000 00
Small tenant-house	134 00
	$10,135 00

Morris County, Montville Township:

Fifty acres of land, with two dwelling-houses & one barn	$5,000 00

Roxbury Township:

Round-house at Port Morris	40,000 00
Trestle-work for dumping coal at Morris	50,000 00
Boarding-house and lot at "	2,000 00
" " " " " "	1,000 00
About 75 acres of land	7,000 00
	$100,000 00

Chatham Township:

14 Passenger-depot at Chatham Station	1,800 00
Freight " " " "	800 00
Blacksmith-shop " " " "	150 00
Vacant lot—over one acre	1,500 00
Dwelling-house and lot at Chatham	1,000 00
Round-house " "	4,500 00
Passenger-depot at Madison	1,600 00
Freight-depot & store-house at Madison	1,200 00
Two acres land at Chatham	500 00
Half-acre lot, (bond-lot)	150 00
	$13,200 00
Total, Morris & Essex Railroad	$2,089,520 00

STATE OF NEW JERSEY,
OFFICE OF COMPTROLLER OF THE TREASURY,
Trenton, November 14th, 1873.

I certify that the above is a true copy of the report made to this department June 30, 1873, by James S. Yard, commissioner of railroad taxation for the State of New Jersey, of the valuation made by him of the real estate owned, used, or occupied in this State by the Morris and Essex Railroad Company.

A. S. RUNYON,
Comptroller.

15 New Jersey supreme court.

THE STATE (THE MORRIS & ESSEX RAILROAD Company, prosecutors) *vs.* JAMES S. YARD, COMMISSIONER OF RAILROAD taxation. } On certiorari.

And the said prosecutor, by Jacob Vanatta, its attorney, comes and assigns the following as reasons why the said statement and valuation made by the said commissioner should be set aside, made null and void, and for nothing holden:

1. Because the said commissioner had no right or power to make the said statement and valuation.

2. Because the act of April 2d, 1873, entitled "An act to establish just rules for the taxation of railroad corporations and to induce their acceptance and uniform adoption," does not apply to or include the prosecutor or its charter.

3. Because if the said act does in terms apply to the prosecutor and its charter, it is contrary to and violation of the Constitution of the United States and of the State of New Jersey, and, therefore, null and void.

4. Because the said statement and valuation are without any sufficient legal authority, contrary to law, and violative of the vested rights of the prosecutor, and erroneous in form and substance.

JACOB VANATTA,
Att'y of Prosecutors.

(Indorsed:) New Jersey sup. court. The State (The Morris and Essex Railroad Company, prosecutors,) vs. James S. Yard, commissioner of railroad taxation. On certiorari. Reasons for annulling, &c. J. Vanatta, att'y. Filed Feb'y 17th, 1874. Benj. F. Lee, cl'k.

16 THE STATE OF NEW JERSEY, *ss:*

[L. S] The State of New Jersey to the justices of our supreme court greeting:

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said supreme court, on writ of certiorari, prosecuted by The Morris and Essex Railroad Company, directed to Albert L. Rumyon, comptroller of the State of New Jersey, requiring him to certify to the said supreme court a certain statement and valuation of certain lands and real estate of the said The Morris and Essex Railroad Company, made in the year eighteen hundred and seventy-three, by James S. Yard, commissioner of railroad taxation, as it is said, manifest error hath intervened to the great damage of the said The Morris and Essex Railroad Company, as by their complaint we
17 are informed, we, being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon entered, then, without delay, you, distinctly and openly, send under your seal the record and proceedings aforesaid, with all things touching the same, to our court of error and appeals to the next term thereof, on the second Tuesday of March next, at Trenton, together with this writ, that, the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to law ought to be done.

Witness Theodore Runyon, esq., our chancellor, at Trenton, the third day of December, eighteen hundred and seventy-four.

HENRY C. KELSEY, *Clerk.*

JACOB VANATTA, *Att'y.*

18 The answer of the justices of the supreme court of New Jersey, within named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the court of errors and appeals in a certain schedule to this writ annexed, as within commanded.

[L. S.]

M. BEASLEY,
Ch. Jus.

(Indorsed:) New Jersey cou't of errors and appeals. The State (The Morris and Essex Railroad Company, prosecutors) vs. The Commissioner of Railroad Taxation. Writ of error. Ret'ble 2 Tuesday of March, 1875. Jacob Vanatta, att'y. Filed May 22, 1875. Henry C. Kelsey, cl'k.

19 New Jersey supreme court.

JAMES S. YARD, COMMISSIONER, &C., *ads.* STATE, (MORRIS & ESSEX RAILROAD COMPANY, pros.)	On certiorari. Affirmance.

Jacob Weart, attorney.

As yet of the term of November, A. D. eighteen hundred and seventy-three.

Witness, Mercer Beasley, esq., chief-justice.

BENJ. F. LEE, *Clerk.*

The court having heard the arguments of counsel, and inspected the assessment removed by the writ in the cause, and duly considered the reasons filed, it is ordered said assessment be affirmed.

On motion of—

JACOB WEART, *Att'y.*

Therefore, it is considered that the said The Morris & Essex Railroad Company, pros., take nothing by their said writ, and that the said
20 James S. Yard, commissioner, &c., do go thereof without day, &c.; and it is further considered by our said court here that the said James S. Yard, commissioner, &c., do recover against the said The Morris & Essex Railroad Company nineteen dollars and forty-seven cents, for his costs and charges by him about his defence in this behalf laid out and expended, by the court now here adjudged to the said James S. Yard, commissioner, &c., and with his assent, according to the form of the statute in such case made and provided, and that the said James S. Yard, commissioner, &c., have execution thereof, &c.

Judgment signed this twenty-third day of March, A. D. eighteen hundred and seventy-five.

M. BEASLEY,
Ch. Jus.

I, Benj. F. Lee, clerk of the supreme court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment in the above stated cause, as the same remains of record in my office.

In testimony whereof I have hereto set my hand and seal of said court, at Trenton, this twentieth day of May, A. D. eighteen hundred and seventy-five.

[L. S.] BENJ. F. LEE, *Clk.*

(Indorsed:) New Jersey supreme court. James S. Yard, commissioner, &c., ads. State, (Morris & Essex Railroad Company.) On certiorari. Affirmance. Copy of judgment. Jacob Weart, att'y.

21 New Jersey court of errors and appeals.

THE STATE, (THE MORRIS AND ESSEX RAILROAD Company, prosecutors,) *vs.* JAMES S. YARD, COMMISSIONER OF RAILROAD taxation. } In error.

Afterwards, that is to say, on the second Tuesday of March, in the year eighteen hundred and seventy-five, in the court of errors and appeals, comes the said The Morris and Essex Railroad Company, by Jacob Vanatta, its attorney, and says that in the record and proceedings aforesaid and in the judgment aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that judgment in the plea aforesaid was given against the said The Morris and Essex Railroad Company, when, by the law of the land, for the reasons assigned
22 in the said supreme court, and for other reasons, judgment in the said plea ought to have been given for the said The Morris and Essex Railroad Company and against the said James S. Yard, commissioner of railroad taxation. Therefore, in this there is manifest error.

Therefore, the said The Morris and Essex Railroad Company prays that the judgment aforesaid, by reason of the aforesaid errors and of the errors appearing in the record and proceedings aforesaid, may be reversed, annulled, and for nothing holden; and that the said statement and valuation of the real property of the said prosecutors, made by the said commissioner of railroad taxation, and by him returned to the State comptroller, may be adjudged illegal, unwarranted, vacated, set aside, and wholly annulled, and that the said prosecutors may be restored to all things it has lost on occasion of the said judgment; and that
22½ said commissioner of railroad taxation may rejoin to said errors.

JACOB VANATTA,
Att'y for Prosecutors.

(Indorsed:) New Jersey court of errors and appeals. The State (The M. & E. R. R. Co., prosecutors) vs. James S. Yard, commissioner, &c. Assignment of errors. Jacob Vanatta, att'y. Filed June 8, 1875. Henry C. Kelsey, clerk.

23 New Jersey court of errors and appeals in the last resort in all causes.

THE STATE, (THE MORRIS & ESSEX RAILROAD Company, prosecutors,) plaintiffs in error, *vs.* JAMES S. YARD, COMMISSIONER OF RAILROAD taxation for the State of New Jersey, defendant in error.

This cause having been argued at the June term, 1875, of this court

by J. G. Shipman, of counsel with the plaintiff in error, and by Robert Gilchrist, of counsel with the defendant in error, and the court having taken time to consider the matter, and now, on the thirteenth day of July, A. D. 1875, of the term of June, 1875, the court being of opinion (among other things) that the act of April 2d, 1873, under which the valuation or assessment was made, does not impair any contract between the State of New Jersey and the said The Morris and Essex Rail-
24 road Company, the prosecutors, and that the act entitled "A further supplement to the act entitled 'An act to incorporate the Morris & Essex Railroad Company,' passed January twenty-ninth, eighteen hundred and thirty-five," which supplement was approved March 23d, 1865, & the acceptance thereof by the said The Morris & Essex Railroad Company did not constitute an irrepealable contract between the State of New Jersey and the said company; and the said court do order that the judgment of the supreme court be in all things affirmed, with costs, and that the record be remitted, &c.

On mot. of def'd't in error, rule entered August 16th, 1875.

25 Court of errors and appeals of N. J., June term, 1875.

THE STATE (THE MORRIS AND ESSEX RAILROAD COMPANY) *vs.* JAMES S. YARD, COMMISSIONER OF RAILROAD TAXATION. } In error.

Syllabus.

1. If the prior clauses of a general law apply in express terms to a special corporation, a general repealer necessarily repeals inconsistent provisions in the special charter; but if there is an absence of such express prior reference, there must be a special repealing-clause to make a general law applicable to such particular corporation.

2. The act of 1873 (Laws 1873, p. 112) applies by clear expression to the Morris and Essex Railroad, and, therefor', the general repealer extinguishes all the provisions in the charter of said company inconsistent with the act.

3. The tenth section applies only to railroad companies having irrepealable charters.

26 4. As applies to corporations, every grant of franchises is a charter, and, therefore, the sixth section of the general corporation act of 1846 must be considered as incorporated in the act of 1865, (Laws 1865, p. 556,) by which it is made in express terms subject to alteration or repeal.

5. The Morris and Essex Railroad has not an irrepealable contract with the State, and is, therefore, subject to taxation under the act of 1873 without its consent.

27 Court of errors and appeals, N. J.

THE STATE, (THE MORRIS AND ESSEX RAILROAD COMPANY,) *vs.* JAMES S. YARD, COMMISSIONER OF RAILROAD TAXATION, &c. } In error.

Argued at June term, 1875.

M'r Shipman for pl't'ff in error.
M'r Gilchrist for def't.
The opinion of the court was delivered by—

VAN SYCKEL, J.:

In McGavisk vs. The State, 5 Vroom, 509, this court held that the supplement to the charter of the Morris and Essex Railroad, passed March 23, 1865, (p. 556,) repealed the general tax law of 1862 pro tanto, and established the only form of assessment for taxes that could be made against the company.

28 By the third section of the latter act, the company is subjected to the payment of a tax of one-half of one per cent. on the cost of their road in lieu of all other imposition.

An act of the legislature approved April 2, 1873, (p. 112,) provided a new mode for the taxation of railroad companies, under which proceedings were taken to assess said company. These proceedings were affirmed by the supreme court, and are now in this court for review.

The act of 1873 is entitled "An act to establish just rules for the taxation of railroad corporations, and to induce their acceptance and uniform adoption." Its preamble recites that—

"Whereas, for the encouragement of railroad enterprise, laws creating and regulating railways in this State usually provide for the payment by them, in consideration of their chartered privileges, of a fixed rate upon their capital stock, or the cost of their works, in lieu of all other public impositions whatever;

29 "And whereas it is, nevertheless, contended that the property of such corporations, being largely acquired for or through the growth and extension of their prosperity, should contribute to the charges and expenses essential for municipal and county purposes;

"And whereas it is desirable, in order to the avoidance of litigation and future dissatisfaction, that such municipal and county taxation shall be authorized, and that the same shall be permanently fixed and regulated: Now, therefore,

"1. Be it enacted, That all taxation upon all railroad companies occupying and using railroads in this State, whether as lessees or otherwise, shall hereafter be made as follows:

"First. Such companies shall pay upon the cost, equipment, and appendages of said railroads, respectively, a State tax, after such rate of taxation as may have been heretofore fixed by law upon such

30 companies, or, in default thereof, after the rate of one-half of one per centum upon such cost.

"Second. Upon all the real property by them as aforesaid occupied, used, or owned for the purposes of their road, or otherwise, excepting their main stem or road-bed and track, not exceeding one hundred feet in width, such companies shall pay a county and municipal tax for the benefit of the counties, townships, and cities, respectively, where the same is situate, after the rate of one per centum upon a valuation thereof, and of all improvements thereon, not by way of repairs, now or hereafter to be made, which valuation shall be made as hereinafter stated: Provided, however, That at the termini of their said roads each company may hold a tract of land, not exceeding ten acres, to be in one parcel, which, with the buildings and improvements thereon,

31 shall be free from the payment of county, township, and municipal taxes whatsoever."

The eleventh section of this act declares that all acts and parts of acts inconsistent therewith are repealed.

In the first place, it is insisted on behalf of the company that this sec-

tion does not repeal the third section of the act of 1865, and the following cases are relied upon to sustain that proposition.

State vs. Minton, 3 Zab., 529; State vs. Miller, 1 Vr., 171; Same case, 2 Vr., 529.

In The State vs. Minton it was held that the Morris and Essex Railroad Company was not affected by the general tax law of 1851, which declared that all lands should be liable to taxation thereby, and repealed all acts and parts of acts inconsistent with its provisions.

The well-settled law in this State is that the provisions of a special charter shall not be altered or repealed except by express words.

32 Therefore, although in the general tax-law of 1851 the words "all lands" were used, they were held not to include the lands of this company, because it must be presumed, in the absence of clear expression to the contrary, that the legislature passed the general law with reference only to those to whom the general tax-law before them was applicable, and not for the purpose of affecting corporations that had in their charters a specific provision for taxation. There was nothing in the general tax-law of 1851, thus construed, inconsistent with the charter of the company, which could be operated upon by the general repealer.

But if the general law of 1851 had enacted that all the lands of every railroad corporation in this State, without exception, should be liable to taxation under its provisions, it would have applied necessarily to the Morris and Essex Railroad, and the general repealer would have

33 swept away any inconsistent provision in its charter.

A general repealer in a general tax-law cannot disturb the provisions of a special charter, because they are wholly different; they are not inconsistent; they may both stand independent of each other. They become inconsistent when the general law by clear expression is made to embrace and is applied to the particular corporation, and its inconsistent provisions are then brought within the reach of a general repealer.

There is nothing in the cases in 1 Vroom, 113 and 369, which is not in harmony with this doctrine.

If the prior clauses of a general law apply in express terms to a special corporation, a general repealer would necessarily repeal inconsistent provisions in the special charter, but if there is an absence of such express prior reference, there must be a special repealing clause to

34 make a general law applicable to such particular corporation.

The question is whether the act of 1873 applies in clear language to this corporate body; and, if so, the general repealing clause obliterates any inconsistent provision in the special charter.

The act by its title relates exclusively to railroad companies, and by its first section enacts that "all taxation upon all railroad companies occupying and using railroads in this State, whether as lessees or otherwise, shall be assessed thereunder."

Language cannot be clearer; every railroad in the State is included; and if any road to which the legislature had power to apply this law can claim that it is not within it, every other road can set up the same exemption, and thus render the law wholly inoperative.

For the purposes of the case now under discussion, this act must

35 be read as if the legislature had expressly said that the Morris and Essex Railroad shall be taxed as in this act is directed.

A new mode of taxation being thereby provided for this company, in the language of the court, in McGavisk vs. The State: "Two methods of taxation for the same general purpose must certainly be repugnant.

Both cannot be used without confusion, oppression, and double taxation; nor can the option to use either be left at the discretion of any public officer. Such extraordinary power could only be conferred by express terms most clearly stated. No such construction can be given to this law by implication. Either the one law or the other must prescribe the only rule for the assessment of taxes against this company; and because of the manifest repugnancy, the later special law must prevail."

This construction will effectuate the clearly expressed intent of
36 the legislature to prescribe a uniform rule for imposing taxation upon the entire class of tax-payers embraced by its enacting clauses.

It is further argued that the preamble of the tenth section of the act of 1873 excludes from its operation all railroad companies having special provisions in their charters for taxation, whether such provisions are repealable or irrepealable, unless the company shall file its acceptance in writing of this enactment.

The tenth section is in these words:

"And whereas certain railroad corporations owning or occupying railroads in this State claim exemption from all taxation, whether State, county, or municipal, further than is provided by their charters, or by special laws for their benefit now existing, which claims, if legal, subject such corporations to public ill-will, and make it their interest to forego the same and agree to the scheme of taxation hereby established:
37 Now, therefore, be it enacted that any such railroad corporation may, within six months from the approval of this act, make and execute, under their common seal and signature of their president, and file in the office of the secretary of state a declaration in writing surrendering all claim to exemption from taxation by them heretofore had or made, and accepting the provisions of this act in lieu thereof."

This statute must be interpreted so as to harmonize all its provisions and give effect to every part of it.

The intention expressed in the first section, to subject every railroad to the proposed scheme of taxation, is so clearly declared that there can be no doubt about it. The difficulty presented to the mind of the lawmaker was, that there was a class of corporations whose submission to the legislative will could not be made compulsory by reason of
38 irrepealable contracts in their charters. With the purpose so clearly avowed to frame the law for all railroads, it must be presumed that the legislature intended, by the 10th section, to remove the obstacle by obtaining the consent of these corporate bodies to the abrogation of their special exempting clauses, and thereby to give the first section full force, and not to render it nugatory by making its efficacy to depend upon the will of those whose assent was not necessary to give it the sanction of a law.

The railroads within the enacting clause of the tenth section are those "that claim exemption from all taxation, whether State, county, or municipal, further than is provided for by their charters, or by special laws for their benefit now existing."

Corporations having repealable charters have never claimed, or even pretended, that they were exempt from all taxation except that
39 specified in their charters. They claim exemption only from all taxation by the general tax-laws; that they have entire immunity from additional burdens until the legislature, by express enactments, shall change the mode in which they are to be assessed.

The claim of exemption from all taxation, further than that provided for by their charters by companies having repealable charters, would in

volve the inconsistency of denying the repealability of charters which are considered to be repealable.

There are no railroad companies, except those having irrepealable charters, which can claim exemption from all taxation, by either general or special laws, further than is provided by their charters.

To this class of corporations only can the tenth section be applied and provisions therein made for extinguishing these special laws, so that the uniformity which the act has in view may be secured.

40 The judgment below must, therefore, be affirmed, unless the prosecutors can be classified with those corporations that have irrepealable charters.

In their original charter (acts 1835, p. 25) the legislature expressly reserved the power to alter, amend, or repeal at pleasure, and by the supplement of 1836 (p. 223) the same right was preserved.

In 1862, the legislature passed a general tax-law, which, in The State vs. Miller, 1 Vr., 368, was held to include the prosecutors by clear expression in its provisions, and thereby to repeal the special mode of taxation to which it was before subject. It is now agreed that the legislature having once exercised its power to repeal, has exhausted it. The force of this argument is not apparent.

The right of repeal placed the prosecutors in the same position that all other tax-payers occupied; it was a right to alter, modify, or repeal, not once, but so often as the legislative will is expressed to that

41 end. There is no analogy between the legislative power and powers granted by deed or will. The latter when fully executed became extinguished, while the former is not in the least impaired or diminished by its exercise.

But upon this branch of the case the prosecutors rely mainly upon the supplement of March 23, 1865. (P. 556 & 961.)

The third section of this supplement provides that the tax of one-half of one per cent., to be paid according to the terms of the original act of incorporation, shall be payable at the expiration of one year from the time the road shall be opened and in use to Phillipsburg and annually thereafter, and shall be in lieu of all other taxation; and it was provided that this section should not go into operation without the written consent of the said company.

This consent, which was afterwards duly filed, it is now urged created an irrepealable contract with the State. Irrepealable grants

42 are in derogation of the sovereign power of legislation, and cannot in any case arise by intendment.

It will not be understood that the legislature has relinquished or surrendered any part of its power, unless the intention to do so is expressed in language which leaves it free from doubt.

The act of 1865 conferred a privilege upon the prosecutors, giving them the option of electing which of two specified modes of taxation they would submit to, without containing any expression which can give countenance to the claim that the supplement is to have any higher quality than the repealable charter of which it became a part. There is nothing indicating an intention to make the provision more permanent than that contained in the original grant.

43 No inference of that kind can be drawn from the language that such tax "shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State, or any law thereof," for the same provision in substance is found in the charter of 1835.

If there could be any doubt that the supplement must partake of the

character of the repealable charter, of which it is a part, I agree, for the reasons stated in the opinion of Justice Depue in the supreme court, that, as applied to corporations, every grant of franchises is a charter, and that the sixth section of the general corporation act of 1846 must be considered as incorporated in the act of 1865, by which it is made in express terms subject to alteration or repeal.

The prosecutors are subject to be taxed by virtue of the first section of the act of 1873, and the judgment of the court below should, therefore, be affirmed.

44 *Assignment of errors.*

Supreme Court of the United States.

THE STATE, (THE MORRIS & ESSEX RAILroad Company prosecutors,) plaintiffs in error,
v.
JAMES S. YARD, COMMISSIONER OF RAILroad taxation for the State of New Jersey, defendant in error.

Afterwards, that is to say, on the second Monday in October, in the year eighteen hundred & seventy-five, in the Supreme Court of the United States, comes the said The Morris & Essex Railroad Company, by its attorney, & says that in the record & proceedings aforesaid, and in the judgment aforesaid given in the court of errors & appeals in the last resort in all causes in the State of New Jersey, there is a manifest error in this, to wit:

That the said court of errors and appeals in the last resort in all causes of the State of New Jersey decided that the act of the
45 legislature of the State of New Jersey entitled "An act to establish just rules for the taxation of railroad corporations and to induce their acceptance and uniform adoption," approved April 2d, 1873, applied to and repealed all the provisions in the charter of the said The Morris & Essex Railroad Company inconsistent with the provisions of the said act, whereas, in truth and in fact, the said act of the legislature of the State of New Jersey does not apply to and repeal all the provisions in the charter of the said The Morris & Essex Railroad Company inconsistent with the provisions of the said act of 1875.

There is also error in this, that the said court decided that the tenth section of the said act of the legislature of New Jersey only applied to railroad companies having irrepealable charters, whereas, in truth & in fact, the said tenth section does not apply alone to railroad companies having irrepealable charters.

There is also error in this, that the said court of errors & appeals decided that, as applied to corporations, every grant of a francise
46 is a charter, and that therefore the sixth section of the general corporation act of 1846 of the legislature of the State of New Jersey must be considered as incorporated in the act of 1865 passed by the legislature of the State of New Jersey entitled "A further supplement to the act entitled 'An act to incorporate the Morris & Essex Railroad Company,' passed January 29th, 1835," which further supplement was approved March 23d, 1865, by which it is made in express terms subject to alteration or repeal, whereas, in truth & in fact, every grant of a franchise to a corporation is not a charter, & the supplement to the said

company's charter, viz, the act of 1865, above referred to, is not affected by the general corporation act of 1846 of the State of New Jersey above referred to, and the said general act is not incorporated in & made part of the said act of 1865, and the said supplement of 1865 is not
47 subject to alteration or repeal by the legislature of the State of New Jersey, but is an irrepealable act.

There is also error in this, that the said court of errors & appeals decided that the Morris & Essex Railroad Company, the plaintiffs in error, have not an irrepealable contract with the State of New Jersey, and is therefore subject to taxation under the said act of 1873 without its consent, whereas, in truth & in fact, the said company has an irrepealable contract with the State of New Jersey, and that therefore the act of 1873, under which the said assessment & valuation were made against the said company without its consent, is contrary to & in violation of the Constitution of the United States, and is null & void as against the said company.

There is also error in this, that the said court of errors & appeals decided that the act of 1873 of the legislature of New Jersey, under which the said assessment was made against the said company, was not
48 contrary to the Constitution of the United States, which forbids a State to pass any law impairing the obligation of a contract, and is not void as against the said company, whereas, in truth and in fact, the said act of 1873 of the State of New Jersey, under which the said assessment is made, is contrary to the Constitution of the United States, & void as against the said company, because it violates the contract made between the State of New Jersey & the said company.

There is also error in this, that the said court decided in effect that the said act of 1873 of the State of New Jersey applied to and affected the rights of the said company, whereas, in truth and in fact, the said act does not apply to & affect the rights of the said company.

There is also error in this, that the said court decided that the act of 1873, aforesaid, repealed the further supplement of 1865 of the company's charter, whereas, in truth & in fact, the said act of 1873 did
49 not repeal the further supplement of 1865 of the company's charter.

There is also error in this, that the said court of errors & appeals gave judgement for the said James S. Yard, the said commissioner, whereas it should have given judgment for the said company.

Wherefore, the said The Morris & Essex Railroad Company prays that the judgment aforesaid, by reason of the errors aforesaid, & for other errors appearing in the record & proceedings aforesaid, may be reversed, annulled, & for nothing holden, and that the said statement & valuation of the real property of the said plaintiffs in error made by the said commissioner of railroad taxation, and by him returned to the comptroller of the State of New Jersey, may be adjudged illegal, unwarranted, & may be vacated and set aside and wholly annulled, & that the said prosecutors, the plaintiffs in error, may be re-
49½ stored to all things they have lost on occasion of the said judgement.

J. G. SHIPMAN,
Att'y of Pl'ff in Error.

(Indorsed:) Sup. Court of the United States. Oct. T., 1875. The State, (The Morris & Essex Railroad Co.,) pl'ff in error, v. James S. Yard, railroad com., &c., def. in error. Assignment of errors.

STATE OF NEW JERSEY:

I, Henry C. Kelsey, secretary of state of the State of New Jersey, and ex-officio clerk of the court of errors and appeals in the last resort in all causes, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom; and also a true copy of the security on the writ of error, and the original citation and service thereof; and also a copy of the opinion of the c't of errors & appeals.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Trenton, this 13th day of January, A. D. 1876, and of the Independence of the United States the one hundredth.

[SEAL.] HENRY C. KELSEY, *Clk.*

(Indorsement on cover:) No. 343. The State of New Jersey, (The Morris and Essex Railroad Company,) plaintiff in error, vs. James S. Yard, commissioner of railroad taxation. New Jersey c't of errors & appeals. Filed 14 January, 1876.

REC. 343—2

SUPREME COURT OF THE UNITED STATES.

THE STATE—THE MORRIS & ESSEX RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES S. YARD, COMMISSIONER OF RAILROAD TAXATION FOR THE STATE OF NEW JERSEY,
Defendant in Error,

On Writ of Error to the Court of Errors and Appeals of the State of New Jersey.

J. G. SHIPMAN,
Attorney for Plaintiff in Error.

ROBERT GILCHRIST,
Attorney for Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

BELVIDERE APOLLO Print, Belvidere, N. J.

SUPREME COURT OF THE UNITED STATES.

—o—

THE STATE—THE MORRIS & ESSEX RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES S. YARD, COMMISSIONER OF RAILROAD TAXATION FOR THE STATE OF NEW JERSEY,
Defendant in Error,

Brief of the Plaintiff in Error.

STATEMENT OF THE CASE.

The Morris & Essex Railroad Company, the Plaintiff in Error, is a corporation of the State of New Jersey. Its railroad runs from Hoboken, opposite the city of New York, in the County of Hudson, in the State of New Jersey, to Phillipsburg, on the Delaware river, in the County of Warren, in the State of New Jersey, opposite the Borough of Easton, in the State of Pennsylvania. The length of the main line is about 75 miles, It has one or two branches. The act incorporating the Company was passed January 20, 1835. Laws of 1835, page 30.

Under the original act the road was constructed and went into operation somewhere about the year 1836, to Morristown, in the County of Morris. It was subsequently, perhaps about the year 18—, continued to Dover, in the County of Morris, and from thence to Hackettstown, in the County of Warren, to which last place it was brought in the year 18—, and from thence to Phil-

lipsburg, its present terminus, to which last place it was brought in the year 1866.

The original obligation of the Company in reference to taxes will be found in the 15th section of its act of incorporation, Laws of 1835, page 30, Section 15, and is as follows:

"As soon as the net proceeds of said railroad shall amount to "seven per centum upon its cost, the said corporation shall pay "to the Treasurer of this State a tax of one-half of one per centum "on the cost of said road, to be paid annually thereafter, on the "first Monday in January of each year; *provided*, that no other "tax or impost shall be levied or assessed upon said company."

By the 20th Section of this act of incorporation, page 32 of the Laws of 1835, the Legislature reserved the right to change this contract. The section is as follows: "And be it enacted that the Legislature reserves to themselves the right to alter, amend or repeal this act whenever they think proper."

In a supplement to the Charter of the Company, passed March 2, 1836, page 225, Section 6, this 20th Section of the original act of incorporation is wholly and unqualifiedly repealed, and in place thereof it is enacted by the 7th Section of the said supplement, as follows:

"That the Legislature reserve to themselves the right to *alter* or *amend* this supplement, or *the act* to which this is a supplement, whenever the public good may require it."

By a general law of the State of New Jersey relative to corporations, approved February 14, 1846, Nixon's Digest, page 168, Section 6, it is enacted as follows: "The CHARTER of every corporation which shall HEREAFTER be granted by the Legislature, shall be subject to alteration, suspension or repeal in the discretion of the Legislature."

In 1862, the Legislature of New Jersey passed a general tax law. Laws of 1862, page 344.

The 8th Section of that act, page 349, enacted as follows: "That "all private corporations of this State, except those which by vir- "tue of any irrepealable contract in their charter or other con- "tract with this State, are expressly exempted from taxation, "shall be and are hereby required to be respectively assessed and "taxed at the full amount of their capital stock paid in and ac- "cumulated surplus, but any real estate, which such corporation "may lawfully own in any other State than this State, shall not

"be liable to be estimated in such accumulated surplus, and the "persons holding the capital stock of such corporations shall not "be assessed therefor."

The 13th Section of the act, page 351, enacted as follows: "That the real estate of private corporations situate within this State shall be assessed to said corporation in the Township or Ward in which it is located in the same manner as the real estate of individuals, and the amount of such assessment shall be deducted from the amount of the capital stock and surplus and funded debt or of the valuable assets of the said corporation." The 21st Section of the same act repealed several previous general tax laws, (referring to them by their several titles) and the section concludes in the following words: "And all other acts and parts of acts whether "*special or local or otherwise* inconsistent with the provisions of "this act be and the same are hereby repealed."

Immediately on the passage of this latter act an assessment was made upon the real estate of the Plaintiff, in the Township of Morris, including their road-bed, right of way and depot grounds. The Company carried the assessment into the Supreme Court. It is reported 1 Vroom, page 370; The State vs. Miller.

The Supreme Court then held that this law of 1862, repealed the previsions of the Company's charter in reference to taxation, and that it was subject to the local taxation provided for in the said act of 1862, and that the assessment had been correctly made against it. This judgment of the Supreme Court was afterwards affirmed in the Court of Errors and Appeals, and will be found reported in 2 Vroom, Rep. 521.

There was no special contract *then* between the Company and the State on the subject of taxation. The Company was not bound to pay the State any tax until its net proceeds should amount to 7 per cent. upon its cost, an event not likely soon to happen, and the Company was then subject to local taxation in the township, where it had real estate, and upon its capital stock paid in, &c., where the principal office was according to the provisions of the act of 1862, already cited. The State, as I have said, received nothing into its treasury from the Company for its net proceeds did not amount to 7 per cent. upon its cost and was not likely to do so for years to come, most likely never. The State wanted revenue. The Company wanted to be rid of the taxation, litigation, and annoyance attending local taxation, and thereupon a

new compact or agreement was proposed by the State upon the subject of taxation, which certainly was to be largely beneficial to the State, whatever it might be to the Company. And that proposal was made to the Company in the 3d Section of the Supplement to their Charter, approved March 23, 1865, Laws of 1865, page 556, Section 3, and is in the following words: "That the tax "of one-half of one per cent. provided by their said original act of "incorporation to be paid by the said Company whenever the net "earnings of the said Company amount to 7 per cent. upon the "cost of the road shall be paid at the expiration of one year from "the time when the road of the said Company shall be open and "in use to Phillipsburg, and annually thereafter, *which tax shall* "*be in lieu and satisfaction of all other taxation or imposition* "*whatsoever by or under the authority of this State or any law* "*thereof; provided*, that this section shall not go into effect or be "binding upon the said Company until the said Company by an "instrument duly executed under its corporate seal and filed in the "office of the Secretary of State, shall have signified its assent "hereto, which assent shall be signified within sixty days after the "passage of this act, or this act shall be void."

The Company did on the 17th day of April, 1865, accept the said section and agreement, and signified it by the following resolution:

"*The Morris & Essex Railroad Company to all whom it may* "*concern*, These presents duly executed under the corporate seal "of the said Company are to certify and make known that, "*whereas*, by an act of the Legislature of the State of New Jer- "sey, approved on the twenty-third day of March, in the year "1865, entitled a further Supplement to the act entitled an act to "incorporate 'The Morris & Essex Railroad Company,' passed "January 29, 1835, it was among other things in and by the third "Section thereof enacted that the tax of one-half of one per cent., "provided by their said original act of incorporation, to be paid "by the said Company to the State whenever the net earnings of "the said Company amount to seven per cent. upon the cost of the "road shall be paid at the expiration of one year from the time "when the road of the said Company shall be open and in use to "Phillipsburg, and annually thereafter; which tax shall be in lieu "and satisfaction of all other taxation or imposition whatever by "or under the authority of this State or any law thereof, *provided*,

"that this section shall not go into effect or be binding upon the "said Company until the said Company by an instrument duly ex- "ecuted under its corporate seal and filed in the office of the Sec- "retary of State shall have signified its assent hereto, which assent "shall be signified within sixty days after the passage of this act "or this act shall be void, *and*, *whereas*, the said Morris & Essex "Railroad Company hath received a copy of the said act and con- "sidered the same. Now, therefore, these presents and this in- "strument are to certify and make known, and the said The Mor- "ris & Essex Railroad Company, in said act mentioned and refer- "red to, doth hereby assent to the said act, approved as aforesaid "on the 23d day of March, 1865, and has agreed and does hereby "agree to be subject to the provisions of the said act, and to pay "*the tax* therein named as therein specified."

This resolution executed under the corporate seal of the Company was filed in the office of the Secretary of State on the 24th day of April, 1865. Laws of 1865, pages 961 and 962.

The Morris & Essex Railroad was completed to Phillipsburg in the year 1866, and on the 5th day of February, 1867, according to the requirements of the said act the Company paid to the treasurer of the State of New Jersey the sum of $26,437.50, and it has annually paid the sum required by the said act up till the present time.

The State reserves to itself no power of repeal whatever in reference to this tax provision by this supplement of 1865.

On the 2d day of April, 1873, the Legislature of the State of New Jersey passed an act entitled "An act to establish just rules for the taxation of railroad corporations, and to *induce* their acceptance and uniform adoption."

The act will be found in the laws of the year 1873, page 112. Enough of it is given to enable the Court to understand its purposes and its application to the present case.

The preamble recites:

WHEREAS, for the encouragement of railroad enterprise, laws creating and regulating railways in this state usually provide for the payment by them, in consideration of their chartered privileges, of a fixed rate upon their capital stock or the cost of their works, in lieu of all other public impositions whatever; *and whereas*, it is nevertheless contended that the property of such corporations being largely acquired for, or through the growth

and extension of their prosperity, should contribute to the charges and expenses essential for municipal and county purposes; *and whereas*, it is desirable in order to the avoidance of litigation and future dissatisfaction that such municipal and county taxation shall be authorized, and that the same shall be permanently fixed and regulated; now, therefore,

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That all taxation upon all railroad companies occupying and using railroads in this state, whether as lessees or otherwise, shall hereafter be made as follows: First, such companies shall pay upon the cost, equipment and appendages of said railroads respectively a state tax after such rate of taxation as may have heretofore been fixed by law upon such companies, or in default thereof, after the rate of one-half of one per centum upon such cost. Second, upon all the real property by them as aforesaid occupied, used or owned for the purposes of their road or otherwise, excepting their main stem or road bed and track, not exceeding one hundred feet in width, such companies shall pay a county and municipal tax for the benefit of the counties, townships and cities respectively where the same is situate, after the rate of one per centum upon a valuation thereof, and of all improvements thereon, not by way of repairs, now or hereafter to be made, which valuation shall be made as hereinafter stated; *provided, however*, that at the termini of their said roads, each company may hold a tract of land not exceeding ten acres, to be in one parcel, which with the buildings and improvements thereon, shall be free from the payment of county, township, and municipal taxes whatsoever.

2. *And be it enacted*, That on or before the first day of January, in each year, the president of every railroad corporation shall, on oath or affimation, make return to the comptroller of this state, of the cost of said road and cost of the equipment and appendages of said railroad used by or belonging to said corporations in this state, respectively, specifying the items and locality thereof, and further showing the cost of said property whereon said state tax is laid as aforesaid, specifying its particular items and their cost; and thereupon, within ninety days after such return, payment shall be made by the said company of the said tax to said treasurer, in default of which payment, remedy may be had therefor by suit.

4. *And be it enacted*, That on or before the close of the legislative session in every year, the governor shall appoint some re-

sponsible citizen of the state, commissioner of railroad taxation, to hold office for the space of one year, whose duty it shall be to make, certify under his hand, and return to the state comptroller a statement and valuation of all the said property occupied, used or owned by or for the purposes of any railroad corporation in any county, city or township in this state, and hereby made subject to county, township and municipal taxation, particularly specifying the same and stating also the township or city wherein the same is situate; such returns and statements shall be made separately for each railroad corporation, and arranged by counties, townships and municipal subdivisions in such a manner as to be of easy reference, and shall be recorded in books in the office of said state comptroller to be provided by him for that purpose, and shall be public records, subject to public inspection.

6 *And be it enacted*, That nothing in this act shall be held to require that such valuation shall be made by such commissioner of the said property taxable for county, townships and municipal purposes belonging to any particular railroad corporation, oftener than once in three years, and that after the first of such valuations is made no other is made for the space of three years thereafter; during said intervening period such valuation shall be final, and said tax of one per centum thereon shall be annually paid thereon to the collectors of the various townships or cities in which said property is situate, as if the same had been laid under the tax laws governing the same; all laws for the collection of ordinary taxes in any such township or city shall be applicable so far as possible to the collection of the tax hereby authorized, or the same may be collected by suit; and it is hereby declared to be the intent hereof, that valuations, in manner aforesaid, of the property of each railroad corporation in this state, for the purpose of county and municipal taxation, shall be made once every three years, but not oftener, and that every such valuation shall be the basis of such taxation yearly, during the intervening period.

10. *Be it enacted*, That any such railroad corporation may within six months from the approval of this act, make and execute under their common seal and the signature of their president, and file in the office of the secretary of state, a declaration in writing, surrendering all claim to exemption from taxation by them heretofore had or made, and accepting the provisions of this act in lieu thereof.

11. *And be it enacted*, That all acts and parts of acts inconsistent herewith shall be and the same are hereby repealed.

12. *And be it enacted*, That this act shall take effect immediately.

Approved April 2, 1873.

James S. Yard, the defendant in error, was appointed the commissioner of railroad taxes under this act, and did according to the requirements of the 4th section of the act just quoted, make and certify under his hand and return to the comptroller of the state a statement and valuation of all the property of the said company used or owned by or for the purposes of the said company in each city, township or county through which the said railroad ran, and it was filed and recorded in the books in the office of the state comptroller, and the state and the different townships were proceeding to collect the tax from the said company according to the assessment of the said tax commissioner. The return and valuation of the commissioner will be found on pages 4, 5 and 6 of the printed record.

The company denied its liability to be taxed according to the requirements of this act of 1873, and denied the power of the state to make the assessment and valuation provided for in the 4th section of the act, and in order that the question of their liability to taxation under this act might be tested, they took a certiorari and brought the said assessment and valuation before the Supreme Court. That Court affirmed the assessment and valuation with costs, and held that the company was liable to taxation under the act of 1873. The opinion of the Court will be found in 8 Vroom Reports, page 229. The judgment entry will be found on page 8 of the printed record at line 25, &c. The company insisted that it was not liable to be taxed under this law but under the law of 1865, under which it had been taxed ever since its acceptance by the company and that that law constituted an irrepealable contract between the company and the state which the law of 1873 could not affect. The Supreme Court having rejected this proposition, as we have seen, the company took a writ of error to the Court of Errors and Appeals, and that Court after argument affirmed the judgment of the Supreme Court. The judgment of that Court as entered of record will be found on page 10 of the printed record, and recites that "the Court being of opinion (among other things)

"that the act of April 2, 1873, under which the valuation or as-
"sessment was made does not impair any contract between the
"State of New Jersey and the said The Morris & Essex Railroad
"Company, the prosecutors, and that the act entitled 'A further
"Supplement to the act entitled An Act to incorporate the Morris
"& Essex Railroad Company,' passed January 29, 1835, which
"supplement was approved March 23, 1865, and the acceptance
"thereof by the said The Morris & Essex Railroad Company did
"not constitute an irrepealable contract between the State of New
"Jersey and the said company, did order the judgment of the
"Supreme Court to be in all things affirmed with costs."

The opinion of the Court of Errors, as delivered by Mr. Justice Vansyckle, will be found on pages 11, 12, 13 and 14 of the printed record.

The company thereupon sued their writ of error out of this Court to reverse the judgment aforesaid. The validity of the act of 1873 is drawn in question, and the validity of the act of 1865.

The errors assigned upon which we shall rely, are the following:

"That the said Court of Errors and Appeals in the last resort in all causes of the State of New Jersey decided that the act of the Legislature of the State of New Jersey entitled "An act to establish just rules for the taxation of railroad corporations and to induce their acceptance and uniform adoption," approved April 2, 1873, applied to and repealed all the provisions in the charter of the said The Morris & Essex Railroad Company inconsistent with the provisions of the said act, whereas, in truth and in fact, the said act of the Legislature of the State of New Jersey does not apply to and repeal all the provisions in the charter of the said The Morris & Essex Railroad Company inconsistent with the provisions of the said act of 1865.

"There is also error in this, that the said Court of Errors and Appeals decided that, as applied to corporations, every grant of a franchise is a charter, and that therefore the sixth section of the general corporation act of 1846 of the Legislature of the State of New Jersey must be considered as incorporated in the act of 1865 passed by the Legislature of the State of New Jersey entitled "A further supplement to the act entitled 'An act to incorporate the Morris & Essex Railroad Company,' passed January 29, 1835," which further supplement was approved March 23, 1865, by which

it is made in express terms subject to alteration or repeal, whereas, in truth and in fact, every grant of a franchise to a corporation is not a charter, and the supplement to the said company's charter, viz: the act of 1865, above referred to, is not affected by the general corporation act of 1846 of the State of New Jersey above referred to, and the said general act is not incorporated in and made part of the said act of 1865, and the said supplement of 1865 is not subject to alteration or repeal by the Legislature of the State of New Jersey, but is an irrepealable act.

"There is also error in this, that the said Court of Errors and Appeals decided that the Morris & Essex Railroad Company, the plaintiff's in error, have not an irrepealable contract with the State of New Jersey, and is therefore subject to taxation under the said act of 1873 without its consent, whereas, in truth and in fact, the said company has an irrepealable contract with the State of New Jersey, and that therefore the act of 1873, under which the said assessment and valuation were made against the said company without its consent, is contrary to and in violation of the Constitution of the United States, and is null and void as against the said company.

"There is also error in this, that the said Court of Errors and Appeals decided that the act of 1873 of the Legislature of New Jersey, under which the said assessment was made against the said company, was not contrary to the Constitution of the United States, which forbids a state to pass any law impairing the obligation of a contract, and is not void as against the said company, whereas, in truth and in fact, the said act of 1873 of the State of New Jersey, under which the said assessment is made, is contrary to the Constitution of the United States, and void as against the said company, because it violates the contract made between the State of New Jersey and the said company.

"There is also error in this, that the said Court decided in effect that the said act of 1873 of the State of New Jersey applied to and affected the rights of the said company, whereas, in truth and in fact, the said act does not apply to and affect the rights of the said company.

"There is also error in this, that the said Court decided that the act of 1873, aforesaid, repealed the further supplement of 1865 of the company's charter, whereas, in truth and in fact, the said act

of 1873 did not repeal the further supplement of 1865 of the company's charter."

From this statement I trust the Court will be able to understand the real point in controversy between the parties.

ARGUMENT.

Reduced to its simplest form perhaps the question to be discussed before this Court, is, does the 3d section of the act of 1865, of the Legislature of New Jersey already recited, constitute an irrepealable contract between the State of New Jersey and the said The Morris & Essex Railroad Company, which the act of 1873, which the State is seeking to enforce against the Company, violates and impairs, and is thus rendered repugnant to Article I, Section 10, clause 1 of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract. If that act did constitute such a contract and the act of 1873 violates it, then the judgment before this Court is wrong and should be reversed. I shall endeavor to prove to this Court that the 3d section of the act of 1865, does constitute an irrepealable contract between the State of New Jersey and the plaintiff in error, and that the act of 1873 violates that agreement and is, therefore, repugnant to that part of the Constitution of the United States already referred to. There are other propositions which I shall assert and maintain in the course of the discussion, but they will be used mainly to strengthen and establish the main proposition, and to show that the Legislature of the State of New Jersey at the time of the passage of the act of 1873, understood that the State had the contract with the company, which we insist it had, and that it never intended the act of 1873 to apply to the Morris & Essex Railroad Company, and that the several positions taken by the Court of Errors and Appeals in their opinion pronounced in this cause are erroneous

We say, then, the 3d section of the act of 1865, when accepted by the Morris & Essex Railroad Company, made a contract, and upon its face it made an irrepealable contract. There was no power reserved by either party at any time to alter, amend, annul or set it aside. It is absolute on its face, and unless some other right can be found outside of the terms of this agreement, it is binding upon both, and neither can legally annul it without the

consent of the other. It has every element of a contract; there are here two competent contracting parties; there is a valuable consideration passing; there is an undertaking to do or not to do a particular thing; there is a part performance. If such a contract was made between individuals there could be no doubt of its absolute and binding character. But the State insists and the Court below have so held that it is not a binding contract upon the State, because it says it is not an irrepealable contract because the power of repeal ~~exerted~~ in the first place in the company's act of incorporation, and secondly, that the act of the Legislature of New Jersey of 1846, already cited, making the charter of every corporation which should be thereafter passed liable to alteration and repeal, was a part of the act of 1865. Upon the first point neither the Supreme Court nor the Court of Errors place much reliance, and they treat it with great hesitation and do not adopt it as an absolute proposition at all. Says the Supreme Court in its opinion: "This act must be construed in connection with the original act of incorporation which by express reservation the Legislature had power to alter and repeal. In any case it will be difficult to give to a supplement to a charter in express terms repealable the quality of irrepealability which the original act does not possess. It *would seem* that when the Legislature exercises its power of alteration or repeal once the original act or supplement simply amendatory of its provisions must go with it." "But be that as it may," adds the Court, "the supplement of 1865, was passed after the general corporation act of 1846," and the Court then goes on to show that this act of 1865 was subject to the law of 1846. It seeks that as a refuge from the former position it was discussing. So the Court of Errors, in their opinion, express the same doubts. "If there could be any doubt," says Mr. Justice Vansyckle, delivering the opinion of the Court, "that the supplement must partake of the character of the repealable charter of which it is part. I agree for the reasons stated in the opinion of Justice Depue in the Supreme Court, that as applied to corporations every grant of franchise is a charter, and that the 6th section of the general corporation act of 1846 must be considered as incorporated in the act of 1865, by which it is made in express terms subject to alteration or repeal."

Neither Court, therefore, puts itself absolutely upon that point, and let us examine the point and see if these doubts are not well

founded, and if the point can be relied upon at all. Let us see the situation of the original charter when the supplement of 1865 was passed. We have seen already that the Legislature by the general act of 1862, had exercised its reserved right to alter and amend the act of 1835, and the supplement of 1836, and had abrogated that part of the charter which exempted it from taxation. It *then* had no agreement with the State on the subject of taxation. It was exposed, under the laws of the State, to township and county taxation. It could plead no exemption whatever under its charter, and so far as that was concerned the power of repeal was exhausted. By the act of 1865, a new contract was formed on the subject of taxation. In that we have seen that no right of repeal was reserved at all. When it passed the original act the right of repeal was carefully preserved. When it passed the supplement of 1836, while it repealed the repealing clause in the original act, it reserved in the supplement the right of alteration and amendment to the original act and to that supplement. The language of the supplement on this point is peculiar. By it the Legislature reserves to themselves the right to *alter or amend this* supplement, *or the act to which* this is a supplement, whenever the public good may require it. The word repeal was entirely left out, and the words *alter and amend* were limited *to that supplement* and *the act to which* it was a supplement. The power extended no further. And the language employed seems clearly to indicate that the matter of alteration and repeal was to be confined wholly to the act and supplement and the matters *therein* contained, and not to any future and new legislation. And the case now stands thus: In the original act of 1835, the right to alter, amend or repeal was entirely taken away. In the supplement of 1836, the right was reserved to alter or amend *that supplement*, or the *act* to which it was a supplement, whenever the public good might require it, limiting it by its very words to these two acts, while in the act of 1865, creating this contract, no right of repeal of this section on taxation is reserved, but I think is by the very terms of the act carefully excluded. I say *carefully excluded*, and I think I will fully prove even *this* declaration. I have noticed the peculiarities of the two acts of 1835 and 1836 on the subject of repeal, and I have said they were confined expressly to these acts. The original act of 1835, and the supplement of 1836, enabled the company to construct its road from Newark to Dover, in the county of *Morris*

with certain branch roads. Now the next supplement passed, which authorized the company to extend their road, was passed February 25, 1846. Laws of 1846, page —. The 2d section of this act enabled the company to extend its road to Stanhope, in the county of Sussex. While the 3d section enacts that the Legislature may alter or amend *this act* whenever *the public good requires it.*"

The Legislature limits the *power* of repeal to the very act in question, and it shows by its continued use of the Legislative reservation of the power of repeal that it considers the power of repeal as only extending to the particular act, and that it means it to apply whenever it increases the power of the company to extend its road.

The next supplement to the company's act of incorporation was approved February 19, 1851. Acts of 1851, page 28. By the 1st section of that act the company was authorized to extend its road from Dover to the Delaware Water Gap or to Belvidere, or between these places. In this supplement the section reserving the right to alter and amend is not inserted, but all the restrictions of the former acts and the supplements are. The 2d section provides that for the purpose of carrying into effect the objects of this act the said company was invested with the rights conferred by the original *act and supplements.* "*And they* are hereby also subjected to all the duties, *restrictions and liabilities in said acts.*" The Court will perceive that while the act does not use the words alter and repeal, yet it does use language so broad and comprehensive that the Legislature gives to themselves the same power they had in the acts referred to. The next was the supplement of March 3, 1854, found in the acts of 1854, page 260, authorizing the company to construct their road to the Passaic river and widen its road. It contains but a single section and provides that for the purpose of enabling the said company to acquire lands to make the road, as pointed out in the act and for no other, they "are hereby invested with all the powers conferred by their charter and its several supplements, subject to all *the other restrictions and limitations therein contained.*" Here also the Court will perceive how the power of the State is preserved over the act. The power to alter and amend contained in the former supplement is here preserved under these words "*restrictions and limitations.*" The next supplement was that of March 6, 1855, found in

acts of 1855, page 177. This act authorizes the company to extend its road from its then terminus at Hackettstown, to Phillipsburg, its present terminus. And the 2d section provides "that for the purpose of constructing the said branch railroad the said Morris & Essex Railroad Company shall be and hereby are invested with all the rights, powers, privileges and authority and franchises given and granted to them by their original act of incorporation and the several supplements thereto, and subjected to *all the duties, restrictions and limitations contained therein.*" The same broad language is here again employed. And all these supplements were passed, the Court will perceive, prior to the general tax law of 1862. Then came the act of 1862, cutting out of the original act, the exemption provided therein in reference to taxation, and the company was left from that time on till 1865, to pay local taxes, as we have seen.

And next we come to the act of 1865. Now the first section provides that it shall be lawful for the Morris & Essex Railroad Company, and they are hereby authorized in completing their railroad and adapting the same to the business of transporting coal and other produce, to lay out and construct a branch railroad to connect with their main railroad at or near the vicinity of Denville, and thence by way of Boonton, &c., and that for these purposes they shall have power to enter upon and take lands and exercise all rights and powers and franchises conferred upon them by their original act of incorporation, and the several supplements thereto, with regard to their main road and its several branches, subject, however, to all *the restrictions, limitations and conditions* of said original acts and supplements, which may be applicable *to the powers and franchises hereby conferred.*"

The Court will see how different the language here employed is. It simply imposes the restrictions, limitations and conditions of the former acts and supplements to *the powers and franchises* thereby granted and to *nothing else* By the very language here employed I submit it throws a shield over the third section of the act, and shuts you up to the conclusion that that is not to be touched. The Court say they do not see the force of the argument that the Legislature having ever exercised the power to repeal has exhausted it. Our argument is, that the Legislature having taken out from the original act the right of the company to exemption from taxation had no longer any thing left to repeal on

that subject, and could exercise no more power until it made a new bargain, and when it made that new bargain unless it reserved to itself the right to repeal that *new* contract upon the subject of taxation, it could not claim it under the old act. I respectfully submit then, that the power of repeal is not found in the original act or any supplement.

Does the act of 1846 apply to this supplement of 1865? I submit not. "As applied to corporations," says the Supreme Court, and the Court of Errors concurs with them, "Every grant of franchise is a charter." It seems to me this position is hardly sustained, either by the authorities cited or by the reasoning of the Court upon the subject; and it would seem to be establishing a very comprehensive rule to say that every supplement passed by the Legislature to the original act of incorporation, no matter how trivial its nature, is "*The Charter*" of the company. Such a principle seems to contradict the very language of the additional acts. They are not entitled or styled charters or acts of incorporation, but supplements or additions to it, and hence in the statute you always find the law styled, a supplement or a further supplement to the act creating the particular corporation. But what the Court had to do and what we are to do here or to find out what the Legislature of New Jersey meant to embrace in the act of 1846. The sixth section of that act, as we have already seen, declares that, "*the Charter* of every corporation which shall *hereafter* be granted by the Legislature shall be subject to alteration, supervision and repeal in the discretion of the Legislature." Does this section apply to *the charter* of the company? It cannot apply to the original act for that was passed in 1835, nor to the supplement of 1836. Does it apply to the supplement of 1865? It is entitled "A further supplement to the act entitled 'An act to incorporate the Morris & Essex Railroad Company,' passed January 29, 1835." It does not profess to be *The Charter* of the company. How then can the act apply to it? The act says "*THE Charter* of every corporation which shall be *hereafter* passed." What is the meaning of the word "*The Charter*," then? Does it mean a supplement to a charter, or does it mean the *original* grant by the Legislature. It seems to me the meaning is obvious. It applies only to the original grant and not to a mere supplement. It uses significant words. It refers to a particular thing, which it calls "*The Charter*!" Evidently the original grant. It certainly does

not mean to say that every time a railroad company gets an additional supplement passed to its original charter, *that that is The Charter* of the company. It is a mere addition, and is never called The Charter. Such I understand has always been the construction put upon it. None of the cases referred to by the Supreme Court refer to a single instance in which a supplement to an act was construed to come within the act of 1846. All the cases refer to the original charter of the company. And Mr. Justice Elmer, in delivering the opinion of the Court in the case of the State vs. Person, 3 Vroom, 134, says the question before the Court was, whether the act incorporating the Warren Railroad Company, passed in 1851, commonly called "a charter," was within the act of 1846, although it contained no repealing clause within it?

The Court show, then, what their idea of a charter, as contemplated by the act of 1846, is, and I have not found a single expression or declaration which intimates that a mere supplement to an original act, which went into effect before the act of 1846 was passed, was such a charter as was contemplated by the act of 1846. Story vs. Jersey & Bergen Point Railroad Company, 1 C. E. Green, 14; State vs. Person, 3 Vroom, 134–566; Tomlinson vs. Jessup, 15 Wall, 454; Miller vs. The State, 15 Wall, 478.

The Supreme Court place emphasis upon the word "*granted*" in the act of 1846, contra distinguished from the word "created." It does not seem to me reasonable that the Legislature, in passing the sixth section of the act of 1846, ever intended, by using the word granted in that section, that it should apply to the supplements to the acts of incorporation passed before that act went into effect, or that they intended to draw a distinction between the words "*granted and created.*" No such thought, I submit, was in the mind of the law maker. It was about to pass a law that should affect incorporated bodies that should *thereafter* come into existence through its grant, and it used the language calculated to express that meaning. It therefore employed words which, according to the understanding of men, applied only to the original act. It called it "the Charter," and in speaking of the word bringing it into existence, they used the word which is understood to be the very fundamental thing in the charter of an incorporated company, the word—grant. A charter is a grant *from the superior* power, and so the act bringing it into existence is called a charter. Angel & Ames on Corporations, § 79, 80–81; 1 Bouveir, Law Dict.

259; 1 Story on the Constitution, § 161; 1 Black. Com., 108. If I am right in this view of the case, the Court erred in applying the act of 1846 to the act of 1865.

But suppose, by the reservation in the supplement of 1836, this act of 1865 was repealable. Suppose, indeed, that the act of 1846 might be applied to it, was it not in the power of the State, and has it not made a contract which it intended should bind it in perpetua? It certainly was within the power of the State to say. I know very well that, by virtue of the power reserved in your charter, I can repeal any bargain I may make with you, and that by the act of 1846 I have the same power, but I waive all that, and in view of the arrangement I am about to make with you, I will make it so binding upon myself that neither of those acts shall touch it. And I insist that that is just what the State, by this act of 1865, has done. And as if it suspected that these very questions might at some time arise it has manifested its intention in the clearest possible manner. What was the object of the parties in making this new contract of 1865? Was it merely to repeat over again what had been done before, make a law on the subject of taxation and let it continue for a brief season and then repeal it and set both parties afloat again on this troublesome subject? Does it not show that the mode of taxation adopted by this act of 1865 was considered by both parties the best that could be devised and that they purposely meant to make it perpetual and to put it beyond the power of either party to annul it? The proposition of the State is plain and explicit. Pay me the sum mentioned at such a time and annually thereafter and you shall never be taxed in any other way than the one herein proposed by any power or authority of the State. And the other party agrees to it. Does it not look like a solemn bargain which the State is bound to carry out in good faith? The Court declares that irrepealable grants are inderogation of the sovereign power of legislation and cannot arise by intendment, and it insists that there is nothing in the act making its provision more permanent than that contained in the original act. Conceding, if you please, the first proposition of the Court, that irrepealable grants do not arise in any case by intendment, let us see if we cannot find enough in this act to show that the State was fully aware of this very proposition, and that the whole argument of the Court to show the absence of express words to create the grant is erroneous. Of course we gather the

intention of a party, in any particular matter, from the words used. And when you undertake to construe an instrument of writing or the statute of a State, you find out the meaning and intention of the party who executed the instrument or of the law-maker who enacted the statute, from the plain and natural meaning of the words. Now, I submit to the Court that no person would take up the section in question and read it without coming to the conclusion that the party making it intended that it should, if accepted, be perpetual and irrepealable. The words are all affirmative and are expressed apparently in clear and unequivocal terms. It provides that the tax which, by their original charter, they were to pay at a particular condition of their affairs, if that condition should ever be reached, which was doubtful, should be paid at a particular time in the near future and annually and perpetually thereafter, no matter whether the company or its stockholders made anything or not, and then it provides that in consideration of the payment of *that tax* it should be in lieu and satisfaction of all other taxation *or imposition whatever by or under the authority of this State or any law thereof.*

How could language be more pointed, more definite than this? Could any form of expression be found that could more clearly, more definitely say to the other party that the contract here proposed should be absolute and perpetual, and should exist as long as the corporation should exist, provided it accepted it? Is it not equivalent to saying that the law of 1846, nor any other law, shall apply to you which will give any power or authority to any body to weaken the force and duration of this contract? The Court says "there is nothing in the act indicating an intention to make the provision more permanent than that contained in the original grant." Surely the Court must have lost sight of the true situation of the parties or it never would have employed such arguments to maintain its position. The Court seem to think that this is giving away the taxes due the State. Not at all. The State was to gain, and greatly so. The company had never paid a cent into the treasury of the State, and it was not likely to do so. The company had, indeed, since the decision in the case of the State vs. Miller, been exposed to local taxation, which was a source of constant irritation, trouble and litigation, but the State greatly needed this one-half of one per cent. to replenish its treasury, which had been so greatly depleted by the dreadful civil war which had

been raging in the country. And under these circumstances the State comes with this proposition to pay her this tax at the happening of an event which was then close at hand, and it would give it such a contract that it would forever close all further difficulties on the subject of taxation.

Was not this the conclusion that the company and its stockholders had a right to draw from the language here used? I submit it was, and it was the conclusion they did draw, and they have not been a little surprised at this attempt on the part of the State to break through this solemn compact and to make new complications on the subject of taxation. The Court places no importance upon the fact that the State gives the company time to accept, and invites it to accept. Why, it seems to me this is the very essence of the matter to prove that the State understood that this was to be a binding contract. Does the sovereign invite the subject, when it enacts its laws, to say whether it will approve of them or not? No; it enacts its law and says, there they are and you shall obey them or suffer the penalty for your disobedience. It issues its commands and the subject obeys them or suffers. If the State had been laying a positive duty upon the company it would have enacted its law and said there it is, obey it or suffer, I am your sovereign and will establish such laws for you as I see fit. On the contrary the sovereign in this case puts itself on an equality with its subject and says, I will not establish this law without your consent; I will reason with you and we will together enter into this compact and it shall bind me as well as you; it shall control us both. Does not this very formula which the State required take it out of the ordinary form of an enactment and give it all the elements of a contract? Why, I ask, would the State have invited the company to go through the idle ceremony of accepting this law, if on the very day after its acceptance, the State could wipe it out? Or why would the company have gone through all the solemn form of accepting this contract and filing it with the Secretary of State and spreading it on its minutes if it had supposed for one moment that the State could at any time, by a single fiat of its power, undo every thing it had done and could throw it back just where it was before? Or is it conceivable that either would have engaged in such child's play as that? No, I submit not. It is beneath the honor, the character and the dignity of the great sovereign to trifle with her subjects thus. And there is but one

conclusion to be drawn from the conduct of the State in this respect: When it held out to the company this offer and asked it to accept it, it meant to say thereby, and did say, if you accept this contract it shall bind me hereafter as well as you. I can't see any other rational conclusion you can draw from this conduct of the State.

But again the State gives us no warning that this bargain might not be perpetual. When it gave the company its original charter and fixed the mode of taxation it notified the company that that might not be perpetual. It put in the body of the charter the right to take it away. So when it passed the several supplements I have noticed, giving the company the right to extend its road, enlarging its powers and increasing its franchises, it put in the notice with the power that it should be subject to all the burdens and restrictions imposed upon it in its original act and supplements, but when it comes to this, as I trust I have already shown, it not only gives us no notice that it will ever claim the right of rescission, but it does more, says much more, it throws its protecting arm, as it were, about this third section and says to us in the first section, I may some day interfere with what I have given here and abridge or alter these powers and these franchises, but this matter of taxation never. In that you are always safe. Is this not so? May it please the Court, is it not so? I submit that it is.

Can it be maintained that the State all the time it was making this bargain, which in every line and feature of it bore the marks of perpetuity, was making a kind of mental reservation that it would, by virtue of some occult power which it possessed and which the other side never dreamed that it had, repeal that contract whenever it saw fit to do it? What would you call such conduct in an individual? Would it be tolerated? Not for a moment. And should the State have higher rights or greater privileges before the law than the humblest of her children under like circumstances? Will you administer one law to the individual and another to the State under similar circumstances? It cannot be! It cannot be! And I should be ashamed for my State, distinguished as it is for the enforcement of law and order in its midst; honored for its institutions; and exalted for the precious associations which cluster around it, if it would come up here with the defence it has. But I am sure it does not, and that the Court in pronouncing the judgment it did for the reasons it has given has

misunderstood the position of the State and has made it assume positions it never intended to take.

But there are other distinctions between this and the former act which it seems the Court overlooked or misconstrued. The Court says "that no inference can be drawn from the language that such tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State or any law thereof," for the same provision the Court says, "is in substance in the charter of 1835." But the Court will observe that there is a marked distinction, not only in the language of the two provisions but in the mode of their enactment, and in the inferences to be drawn from them. The act of 1835, enacts that as soon as the net proceeds of said road shall amount to 7 per cent. upon its cost, the said corporation shall pay to the treasurer of this State a tax of one-half of one per centum upon the cost of the said road, to be paid annually thereafter on the first Monday in January of each year, and then by a provision it limits or qualifies the enacting part by saying "that no other tax or impost shall be levied or assessed upon the said company." And there it stops, but right along side of this provision is found the other provision also, that the State will change this when it pleases by any law it may choose to pass. These two provisions are not inconsistent and incongruous; but in the section under consideration the State enacts it as the fundamental law that this tax shall be paid at a specified time in the future, and that no other tax or imposition shall be laid upon the company *by or under the authority of this State or any law thereof.* It is for a future thing the State is legislating, and it ties itself down by the language here used to the covenant that when the company shall pay that tax the State will give no authority nor sanction any law that will impose any other tax than the one here provided. What gross inconsistency it would give the law to have within it the two enactments or ideas that no other tax or imposition shall be laid upon the company by any authority or law of the State, and that the State should have the right whenever it pleased to exercise the authority and pass the law, to lay another and a different tax upon it. The two things can't go together; the one destroys the other, and as the State has plainly said on the face of the law, we will give no authority or law to tax you any otherwise than you are taxed by the law it plainly

meant to give up the other idea, and did give it up, and cannot recall it without the consent of the other party.

The Court further intimate that the act created not a contract but a mere privilege, which is nothing more than a legislative concession voluntarily made, subject at any time to be withdrawn at the will of the Legislature. And the Supreme Court rely, in their opinion, upon the authority of The Rector of Christ Church vs. Philadelphia, 24 Howard, 300; The People vs. The Com. of Taxes, 47 New York, 501. But the Court, I think, will readily perceive that the case in hand has no similitude to the cases above mentioned. In the New York case it was a mere gratuity by which the Legislature declared that no real estate whatever belonging to the society of the New York Hospital should be subject to be taxed by any law of the State. The Court said that this did not constitute a contract, but was a spontaneous concession of the Legislature not connected with any service or duty *imposed upon the corporation*. It was *therefore subject to modification or repeal.*

So in the case in 24 Howard the Legislature of Pennsylvania had enacted that the real property belonging to Christ's Church Hospital in the city of Philadelphia, so long as the same should belong to said hospital, should be free from taxes. The Legislature afterwards taxed it, and the point was, whether this was a contract. The Court used the same language as that used by the New York Court of Appeals, for that Court relied solely upon the case in Howard for its opinion. The Court say the plaintiff's claim that the exemption conceded by the act, is perpetual, and that the act itself is in effect a contract. This concession of the Legislature, however, the Court says, was spontaneous, and no service or duty or other remunerative condition was imposed on the corporation. It belongs to the class of laws denominated—privileged—favorable. It attached only to such real property as belonged to the corporation, and while it remained its property, but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence. Of a like character are the remarks of this Court in the case of Tucker vs. Ferguson, 22 Wall. 574. The Court observe, in reference to the act in question in that case, that it was not a contract. There was no consideration. The company was required to do nothing, and did nothing in return. As between individuals the stipulation would belong to the category of

nude pacts. It has no higher consideration because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made which might be kept, changed or recalled at pleasure.

The Court will at once perceive how different these cases are from the one now before the Court. They were founded upon no consideration; were mere donations to these bodies which could be stopped at any time. There was nothing in any of them to show that they were to be binding upon the State at all. But the inference is very strong, from the language of the Court, that if it had been founded upon a consideration it would have been very different. They were not like the present case when the company had been invited to accept a contract which required them to pay to the State a tax of one-half of one per cent. on the cost of their road, no matter whether the company or its stockholders received a cent or not, and to do it within a limited time. These cases were not like the present, where the company had accepted the terms imposed on them by the State, had entered upon the execution of it and had executed it and faithfully lived up to it and paid its money to the State until this strife arose, under the confident belief and expectation that the State never would and never could impose any other tax upon it than it was then paying. I say neither of these cases was anything like this, or the decisions would have been very different. And I submit that this case comes within the very definition of a contract which cannot be impaired by legislation, adopted by the Supreme Court of the United States, in Fletcher vs. Peck, 6 Cranch, 87, and adopted by the Court of Errors and Appeals of the State of New Jersey, in the case of the State vs. Jersey City, 2 Vroom, 581. In that case the Court said, "a contract is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed," and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor and implies a contract not to reassert the right. I submit it will be hard to distinguish the contract in this case from the one just cited. In confirmation of my position on this point, that this is a contract, I refer

to the case of The Home of Friendless vs. Rouse, 8 Wall. Rept. 430. In this case the Court held the act of the Legislature to be a perpetual contract where the State had, for the purpose of encouraging persons to build up the Home of Friendless, declared that *its* property should be exempt from taxation, and that the act of Missouri, like our act of 1846, "should not apply to that corporation." Was that any stronger than the language shall be in lieu and satisfaction of all other taxation or imposition whatever by or under the authority of this State, or any law thereof? I submit not.

I refer also to the case of Humphrey vs. Pegues, 16 Wall. 244.

I also refer to Cooly's Const. Law, 279 to 281.

McGee vs. Mathis, 4 Wall. 156.

Jefferson Branch Bank vs. Skelly, 1 Black., 439.

Piqua Branch vs. Knoop, 16 Howard, 369.

New Jersey vs. Wilson, 7 Cranch, 164.

Another reason we offer to show that the Legislature regarded this third section of the act of 1865 as a binding contract, was that it had not included the plaintiff's in error within the terms of the act of 1873 at all. The Courts of New Jersey have settled that this act of 1865 is the only one under which the plaintiff could be taxed. McGavick vs. The State, 5 Vroom, Rep. 509. Until then the State can show a lawful abrogation of this act; it cannot tax the company in any other way than by the one provided for under the third section of the act in question. The defendant, as we have seen, attempts to find that abrogation in this act of 1873, but we reply that, that act does not repeal the plaintiff's act of 1865, even if the Legislature had the right to do so, and we reply that the Legislature intentionally adjusted the repealing clause in the act of 1873, so that it should not affect the plaintiff's act, because it knew that it was an irrepealable act. The 11th section of the act of 1873, as we have seen, declares "that all acts, and parts of acts inconsistent herewith, shall be and the same are hereby repealed." Repeated adjudications in New Jersey have held that these general words, in a general law, do not embrace the charters of private corporations, nor affect privileges or immunities granted to them, even though their charters may be repealable. The reasonable inference always being that when the Legislature intended to take them away then they will do it in express terms and e converso; when they do not do it in express terms they do not intend to do it.

The State vs. Mintin, 3 Zabriskie Rept., page 530.
The State vs. Brannin, 2 Zabriskie, 485.
Mechanics & Traders' Bank vs. Bridge & Boyer, 1 Vroom, 113.
The State vs. Miller, 1 Vroom, 171.
The State vs. Mayor of Jersey City, 2 Vroom, 576.
The State vs. Miller, 2 Vroom, 529.

Both the Supreme Court and the Court of Errors admit the binding force of this rule. But they withdraw this case from the effect of it by holding, in the Supreme Court, that the act is repealed by implication in the Court of Errors, by holding that if the prior clauses of a general law, apply in express terms to a special corporation, a general repealer necessarily repeals "inconsistent provisions in the special charter." The Court does not seek by this to overthrow any of the former decisions but to conform to them. By a uniform course of decisions in the State of New Jersey, it has been held that the general words in a general repealing statute, viz: all acts and parts of acts inconsistent herewith are hereby repealed, do not touch the charters of private corporations, no matter how inconsistent they may be with each other because the general law is not intended to touch the private law, but leaves the corporation to be taxed according to the provisions of its charter, but in this case the Court of Errors has held that if on the face of the act it is broad enough to cover the private act in question, then the *repealing clause* will be held to repeal the private act also. In other words the Court holds that because this act of 1873, by its first section, enacts that "*all* taxation upon ALL *railroad* companies occupying and using railroads in this State, whether as lessee or otherwise, shall be assessed thereunder;" that *therefore*, the boundaries of the repealing section are so much enlarged that they must of necessity take in this private corporation also. With great deference to the learned Court, it seems to me this is an impossibility. How can the use of one set of words in one part of an act, pray, enlarge the meaning of the words and sentences in another part of the act? And I do most respectfully ask, how can the fact that the Legislature, in the first section of the act, uses the words, "ALL *railroad* companies," make the words "all acts and parts of acts inconsistent herewith are hereby repealed," mean anything different from what they always have meant, and from what they always have been declared to mean? Pray, how can it be done? The Court is carried away by the use of the word *all* in the first section of the act, and

reasons because that word embraces every railroad, that *therefore*, it must of necessity embrace the plaintiff's, and therefore, the repealing clause must of necessity take in the plaintiff's charter. But the Court are entirely misled by this word, entirely misinterpret the meaning of the Legislature. The Legislature did not intend, by the use of the word *all railroad* corporations, to embrace every railroad in the State of every kind and description. It made use of a general term and meant by the word, *all*, *all* railroads it had a right to tax. Why, the Court commit the absurdity here of holding that it takes in every railroad in the State, or, as the Court expresses it, "every railroad in the State is included." And yet, almost in the very next paragraph, the Court is compelled to admit that the word "*all*" does not mean each and every railroad in the State, but it means only those, the Court says, that have not an irrepealable contract with the State in their charter, and the Court in the afterpart of its opinion discriminates against the former part of it, and the two parts are really inconsistent with each other. When the Court is at last compelled to say that this act does not embrace *all* railroad companies, and that the 11th section does not repeal *all* railroad charters whose system of taxation is different from the one provided for in the act of 1873, how can it say, with any degree of consistency, that the Legislature meant by the 11th section of the act to repeal this charter of the plaintiff's? The Court tries to reconcile its opinion to the opinion of the Court in the case of The State vs. Mintin, 3 Zabriskie, 529. You can't reconcile them. The one or the other must fall. The language of the general act the Court had to deal with in that case was just as broad and comprehensive as the Court holds the language in this act to be, and yet the Court in that case said the general words did not touch the private act. The Court did not stop at all to consider whether the acts were inconsistent with each other, they did not stop to inquire whether the language used in the former part of the act was broad enough to cover a private corporation; they looked down to the repealing section to see what ~~they~~ that contained, and when they read it they said, "there we find the will of the Legislature, and by its will, as expressed in that section of the act, we are bound. We shall not grope about in the act to find expressions broad enough to cover the corporation," whose case was then before it. They sought the will of the Legislature in the repealing clause ~~when~~ where alone it was found, and

having found it, they gave effect to it ; and so are all the decisions I have referred to. And I do most respectfully submit that the opinion, both of the Supreme Court and the Court of Errors, are anomalous in this point, in this cause. They are opposed also to the entire course of Legislation in the State on this subject.

Since the train of decisions which have followed each other on the point now under consideration, the Legislature, when it intended to reach special charters have used language in the repealing section broad enough to cover them. Thus the 21st section of the general tax law of 1862, (see laws of 1862) page 353, particularly specifies the general acts to be repealed, and then provides "that all other acts and parts of acts, whether *special or local or otherwise*, inconsistent with the provisions of this act, be and the same are hereby repealed.

So also in the general tax law of 1866, approved April 11, 1866, Nixon's Digest, 951, by the 32d section designates particular laws to be repealed, and then provides that all other *acts or parts of acts*, whether *special or local* or otherwise, inconsistent with the provisions of this act, be and the same are hereby repealed.

Now here in these acts the Legislature used the particular words "*special or local or otherwise*" to manifest thereby its intention to reach every act within its power, except those especially reserved in the act.

And the Supreme Court and the Court of Errors, in the State vs. Miller, 1 Vroom, 371 ; Mechanics' and Traders' Bank vs. Bridges, 1 Vroom, 113 ; State vs Miller, 2 Vroom, 528 ; State vs. Mayor of Jersey City, 2 Vroom, 570, hold that these words did reach private charters and did repeal them whenever they were inconsistent with the general act with which they came in conflict, and nobody doubted it. We have here then the Legislative intent given in unmistakable language when the Legislature designed to repeal *special charters*. The Legislature, when they passed this act of 1873, had these precedents, and had the decisions of the Court upon them before their eyes. Can it be that they intended to establish a new rule in the making and construeing of statutes ? Did that body when they passed this act of 1873, and left out the words "*special or local or otherwise*," mean to leave it to the Court to say that they, by leaving them out meant by "*implication*" to destroy special and local charters, or meant to leave it to the Court to say whether the words were broad enough in the

body of the act to repeal these charters without the use of the words "*special or local?*" Or did they mean to say by leaving out these significant words and using only general words of repeal that they did not intend to affect the *private act* or contract of the plaintiffs in error upon the subject of taxation? I can't help but think they meant the latter. What was the use in putting in any repealing clause at all? If the reasoning of the Court of Errors is right, that the Morris and Essex Railroad Company is certainly included in this act of 1873, under the term "*all railroad companies*," and that as this act of 1873 is in direct conflict with the provisions of the act of 1865, in reference to the taxation of the plaintiff, it must of necessity be repealed. Why did the Legislature find it necessary to use the repealing clause at all? If the Legislature meant on the face of the act to make it broad enough to cover *all* railroads, and if the provisions of the act of 1873 were, as the Court says, entirely repugnant to the charter of each and every railroad corporation, so that the two could not stand together, would it not seem to be almost a work of supererogation to put a repealing clause also in the statute? I submit it is not at all according to the ordinary course of Legislation. And is it conceivable that the Legislature, when they did put in the repealing clause would abandon the language they had been using to express their intention to overthrow private charters, and use language which the Court had over and over again declared did not disturb or in any way affect private charters? It does not seem reasonable.

To put the construction I contend for on this act, harmonizes the decisions of the Court and the former declarations of the Legislature. To give it the construction put upon it by the Court of Errors and the Supreme Court, throws both into utter confusion

The only remaining suggestion I have to make to show that the Legislature did not intend to include this company within the terms of this act of 1873, is, that by the 10th section of the act they are expressly exempted from its effect without their consent.

The preamble to the 10th section recites "that certain railroad corporations owning or occupying railroads in this State *claim exemption from all taxation, whether State, County or municipal*, further than is provided by *their charters* or by *special laws* for their benefit now existing, *which claim, even if legal, subjects, said*

corporations to public ill-will, and make it their interest to forego the same and agree to the scheme of taxation hereby established." and the 10th section then says: "Now therefore be it enacted that *any such railroad corporation* may within six months "from the approval of this act make and execute under their common seal and file in the office of the Secretary of State a declaration in writing, surrendering all claims to exemption from "taxation by them heretofore made, and accepting the provisions "of this act in lieu thereof."

The Court of Errors holds that this can only apply to those companies having *irrepealable charters*. The Court would seem by it to restrict the tenth section to those corporations *only* which have irrepealable provisions in their original act of incorporation; an interpretation which the act certainly does in no sense convey. Nor will a fair interpretation of this tenth section bear even the construction that it applies only to those corporations who have undisputed irrepealable contracts. I think it plain that its purpose is much more extensive. Neither the preamble to the section, nor the section itself, alludes in express terms to railroad companies having *irrepealable charters*. If it had intended only to refer to them,how simple and easy it would have been to have said so. Is it not fair to infer that it would have so provided, and that the preamble would have recited that "whereas there are certain railroad corporations owning or occupying railroads in this State which have irrepealable contracts with the State in their charters which exempts them from all taxation, whether State, County or municipal, further than is provided for in their charters, which subjects said corporations to public ill-will, and make it their interest to forego the same and agree to the scheme of taxation hereby established; and that the 10th section would then have enacted that all "such railroad corporations" might, within the time provided for in the said act, file their written approval of the said act and agree to its terms? Such it seems to me would have been the language of the act if it had intended to limit it to this class of corporations alone. But it has not done so. It does not pretend to limit it in express terms to such charters, but refers to the whole class who *claim* exemption; not to those who *have* exemption, but to those who *claim*, whether that claim is well-founded or not; and then goes on further to say, *which claims, even if legal*, subjects said corporations to ill-will, &c.

And then it provides that *such railroad* corporations may proceed as therein provided. Now, *what* railroad corporations are meant here? Such as have these *irrepealable charters* alone? I say no; but it embraces also those *who claim* to have exemption from any other taxation than such as is provided for by their charters or by *special* laws for their benefit, even if *that claim* should eventually prove to be illegal. The language of the preamble and the tenth section shut you up to this conclusion. The word "claim" in the preamble does not at all convey the idea of a fixed and conceded right, but refers to something of a doubtful or uncertain character, to a right demanded by the one party, but questioned or denied by the other. And so the words "even if" imply doubt and hesitation—imply that there is a question about the right of the party, which might be decided by the Courts in the end in their favor, showing that the Legislature intended to embrace in the act all such corporations as set up a reasonable *claim* to exemption, even if that claim might be doubtful. And I submit that the Courts below, in seeking to bring the plaintiffs within the terms of the act, have put a forced construction upon it. But it is not necessary for me to pursue this line of argument further. I refer to it to show the mistaken interpretation given by the Court to the act throughout. I submit that this company is within the very terms of the tenth section of the act. That section provides for all corporations having irrepealable contracts, whether in their original charters or by *special laws enacted* for the purpose. I trust I have already shown that this company has an irrepealable contract with the State, existing in the form of a special law passed for that very purpose, and that one of the very objects of the Legislature was to include this special law within the terms of the tenth section of the act, and not to tax this company under that act without its consent in writing thereto.

The special taxation provided for this company was different from that provided for any other railroad company. The company had claimed that under the special law it had an irrepealable contract with the State and could be taxed only according to the terms of that act. The Court had sustained them, and had decided that the company could only be taxed according to the provisions of this act. The company resisted all and every attempt to tax them in any way except by this act of 1865. They claimed and insisted

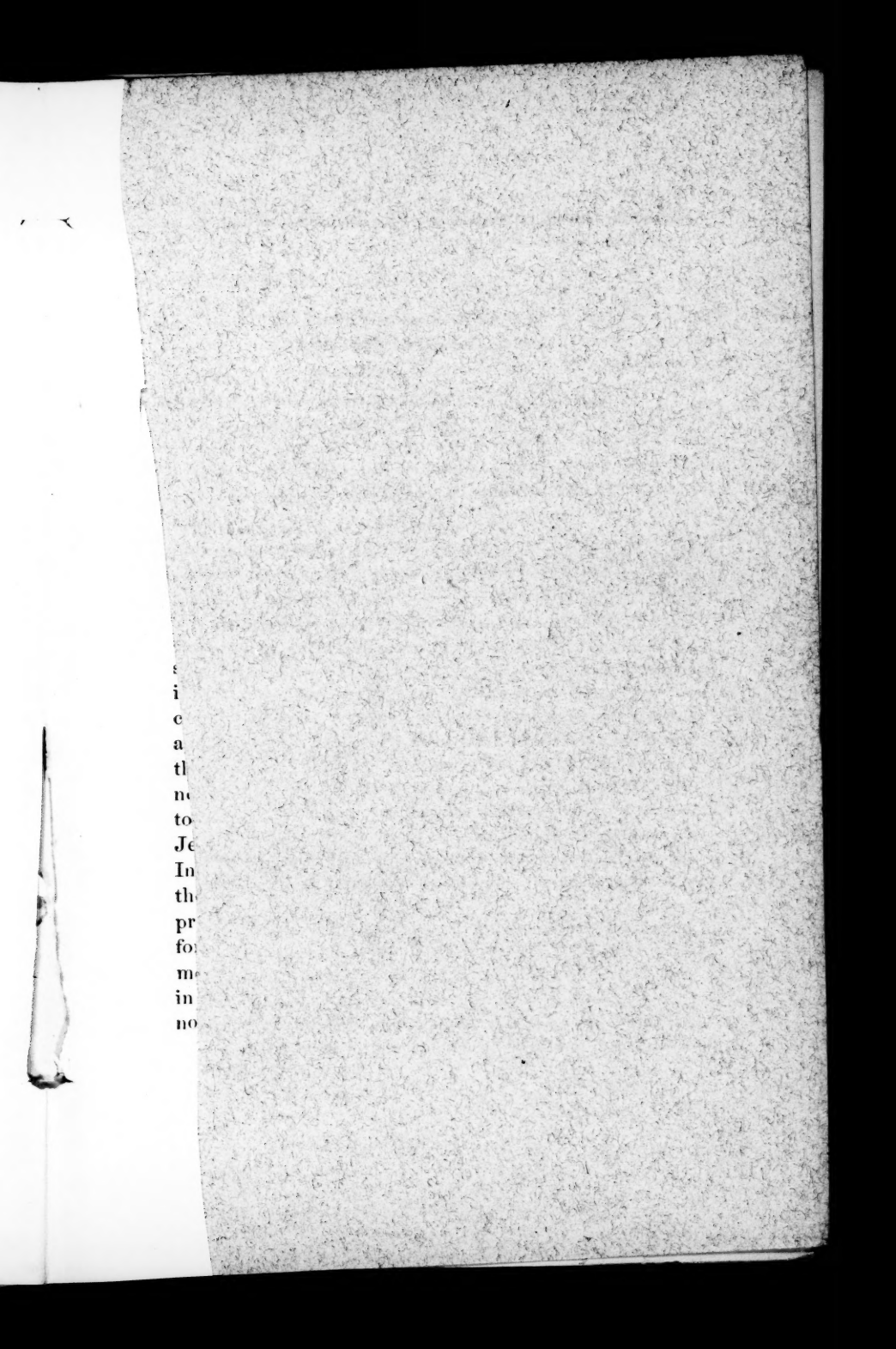
that this act was irrepealable, and the Legislature recognized this claim and confessed its binding force, and *therefore* provided that the company should, if it desired, file its written consent to be taxed according to the act of 1873. Not having done so, it is not liable to taxation under that law, but has a right to stand on the act of 1865, and to insist on its binding force and to claim the pr tection of the fundamental law in its enforcement.

And *that* the Morris and Essex Railroad Company does.

It comes before this Court and claims that in the act of 186 has an irrepealable contract with the State of New Jersey claims that it can be taxed in no other mode or manner than one provided for by that act; and it claims that the State, in tempting to tax it according to the terms of the act of 187 violating its constitutional rights; and it maintains, finally, the Courts of New Jersey, in upholding the State in its effor tax it according to the law of 1873, committed an error in j ment, and that their judgment should be reversed.

J. G. SHIPMAN,
Attorney of Plaintiff in Er

Dated BELVIDERE, NEW JERSEY, September 28, 1877.



HOLBROOK'S Steam Printery, No. 11 Mechanic St., Newark, N. J.

Supreme Court of the United States.

The State of New Jersey, the Morris & Essex Railroad Company, Prosecutors, Plaintiffs in Error,
vs.
James S. Yard, Commissioner of Railroad taxation of the State of New Jersey.

FRED'K T. FRELINGHUYSEN'S BRIEF.

The case before the Court is this:

The Morris & Essex Railroad originally extended from Newark to Morristown, and was afterwards extended to Phillipsburg, thirty miles further, and by its charter (Laws of 1835, p. 30, sec. 15), it was provided that as soon as the net proceeds of the road amounted to seven per cent. on its cost, the Company should pay a tax of one-half of one per cent. on the costs of the road, and that no other tax should be assessed upon the Company.

The Legislature by the 20th section of the charter reserved the right to alter, amend or repeal the charter whenever they should think proper. By a supplement (Laws 1836, p. 225), the twentieth section of the charter which contained the reservation of the right to alter, amend or repeal, was repealed, and the seventh section of the supplement is in these words: "That the Legislature reserves to themselves the right to alter or amend *this* supplement, or the Act to which this is a supplement, whenever the public good may require it."

In 1846, a general law was enacted in these words: "The charter of every corporation which shall *hereafter* be granted by the Legislature, shall be subject to alteration, suspension or repeal in the discretion of the Legislature." Nixon Digest, p. 168, sec. 6.

In 1862 (Laws of 1862, sec. 8, p. 349), it was enacted that all private corporations in the state, except such as had irrepealable

charters, should be taxed on their capital and surplus, and that their real estate should be taxed in the township or ward in which located, but that the amount of such local assessments should be deducted from the amount of the capital stock and surplus on which the corporation was taxable; and the twenty-first section, after repealing certain general laws, is as follows:

"And all other acts and parts of acts whether ***special, local, or otherwise,*** inconsistent with the provisions of this act, be and the same are hereby repealed."

The Supreme Court of New Jersey held, 1 Vroom, 870, and the Court of Errors and Appeals of New Jersey held, 2 Vroom, 521, that this act of 1862 was clearly inconsistent with the special contract relative to taxation contained in the charter of the Morris & Essex Railroad Company, and as the Legislature had in the supplement of 1836 reserved the right to alter and amend ***that supplement,*** and the original charter, and now did repeal all acts whether ***special*** or local inconsistent with the provisions of the act of 1862, that the Company was liable to be taxed under and according to the act of 1862.

The act of 1862 was a general law. The power reserved in the supplement of 1836 to alter the contract as to taxation contained in the charter was exercised, and while not exhausted by its exercise merely, did cease to exist, because the power to alter and amend was expressly confined to the supplement of 1836, and to the charter, and because the act of 1862 annulled and obliterated all contract or special provisions relative to the taxation of the Morris & Essex Railroad Company.

That Company after this repeal by the act of 1862, of its contract with the State stood open as any individual to taxation. It had no privileges and was subject to no disabilities.

Such being the position of the Company on March 23, 1865 (Laws of 1865, p. 556), the Legislature, having regard to the welfare of the State, both in securing internal improvements, and in obtaining the greatest amount of money by just taxation, passed a law in form a supplement to the charter of the Morris & Essex Railroad Company, authorizing that Company to construct two branch roads, and to bridge the Passaic river. And by the third section it was enacted "That the tax of one-half of one per cent. provided by the original act of incorporation to be paid by the said

Company, whenever the net earnings of the said Company shall amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said Company shall be open and in use to Phillipsburg, and *annually* thereafter, which tax shall be in lieu and satisfaction of all other taxation and impositions ***whatsoever by or under the authority of this State, or any law thereof***, provided that ***this section*** shall not go into effect, or be binding upon the said Company, until the said Company, by an instrument duly executed under its corporate seal and filed in the office of the Secretary of State, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

The provision for taxing one-half of one per cent. upon the cost of the road contained in the original charter, had, as we have seen, been repealed by the general law of 1862, as construed by the Supreme Court of New Jersey in 1 Vroom, 370, and by the Court of Errors and Appeals of New Jersey in 2 Vroom, 521, but that provision of the original charter is nevertheless referred to in the third section of the act of 1865, probably for the purpose of showing that this new arrangement of 1865 extended not only to the taxation of the branches authorized by the supplement of 1865, but to the entire road of the Morris & Essex Railroad Company.

And further, the Morris & Essex Railroad Company, by a supplement to the charter approved March 5, 1867, (Acts of 1867, p. 144), were authorized to increase their capital $10,000,000, to straighten their road, reduce the grades, make necessary sidings, lay additional tracks and make other improvements, and by the third section it was enacted that "No tax by or under the authority of this State, *shall be* imposed upon any property purchased, held or used by said Company, for the purposes of their charter, or of any supplement thereto, except the tax of one-half of one per centum on the cost of their road, which by the said charter and the supplement thereto, approved March 23, 1865, was required to be paid by said Company in lieu of all taxes, ***any act to the contrary notwithstanding.***"

Thus we find that the Morris & Essex Railroad Company, by its original charter in 1835, had a special provision as to taxes; that by a supplement in 1836, the Legislature reserved the power to alter and amend the provisions of *that* supplement and of the original charter; that by the general tax law of 1862, the special

provision was repealed, and that the Morris & Essex Railroad Company had no privileges, and was under no disabilities as to taxation ; that in 1865, the Legislature submitted it to the election of the Morris & Essex Railroad Company, whether or not to accept a stipulation that they should within one year from the time the extension of their road to Phillipsburg was open and used, pay the State one-half of one per cent. on the cost of their entire road, and do so annually, and that the tax should be in lieu and satisfaction of all other taxation ***whatsoever by or under the authority of the State, or any law thereof,*** and that the Morris & Essex Railroad Company accepted the provision and closed with the State ; that in 1867, the Legislature again declared that no tax, by or under the authority of the State, except that provided for in the act of 1865, should be imposed on the Morris & Essex Railroad Company, ***any act to the contrary notwithstanding***

The Legislature, neither in the act of 1865 or in that of 1867, reserved any power to alter, amend or repeal the stipulation as to taxation thus submitted to the election of the Morris & Essex Railroad Company, and by it accepted, and then affirmed distinctly again by the Legislature in the act of 1867.

It is to be observed that it would have been a substantial and a verbal contradiction, for the acts of 1865 and 1867 to have enacted that their provisions should be subject to be altered, amended or repealed by the Legislature.

The acts provided that the tax of one-half of one per cent. on the cost of the road to be paid annually should in the words of the act of 1865, " be in lieu and satisfaction of all other taxation and imposition whatsoever by or under the authority of this State, or any law thereof."

And in the words of the act of 1867, " that no tax by or under the authority of this State ***shall be*** imposed on the Morris & Essex Railroad Company, except that required to be paid by the supplement of 1865, ***any act to the contrary notwithstanding.***" Now add but these provisions shall at all times be subject to being altered, amended or repealed by the Legislature, and we destroy the very permanency and perpetuity which the Legislature carefully introduced to induce the Company to accept the arrangement.

And it will be observed that this stipulation as to taxation which provides that no other tax shall be imposed on the Morris & Essex Railroad Company under the authority of the State, or any

law thereof, any act to the contrary notwithstanding, is by the decision under review swept away, while it is admitted that the Legislature has not by any express declaration signified any such purpose.

If the decision is sustained, this will be a notable case to show that an implication discovered by the Court can over-ride the strongest expressions enacted by the Legislature.

And now in the statement of this case we come to the act of 1873, the effect of which, it is the object of this proceeding to determine.

For our present purposes it is enough to observe that the act of April 2, 1873 (Laws of 1873, p. 112), established a different rule of taxation than that agreed upon with the Morris & Essex Railroad Company by the supplement of 1865, and affirmed by the act of 1867; that the act of 1873 nowhere alludes to the Morris & Essex Railroad Company by name; that it does not specifically alter, amend or repeal either the act of 1865 or 1867; that it does not by expression repeal special laws, but simply by the eleventh section declares in a general way, that all acts and parts of acts inconsistent therewith are repealed.

First, I submit that the supplements of 1865 and 1867 contain an irrepealable contract between the State and the Morris & Essex Railroad Company. Second, That the Legislature by the act of 1873 did not in fact, and did not intend to repeal either the supplement of 1865 or that of 1867.

I. That the supplements of 1865 and 1867 are irrepealable.

An act passed by a Legislature conferring certain rights and privileges on a corporation, which act is, as provided, accepted by the corporation, is, while unrepealed, a contract between the state and the corporation.

The fact that the agreement may be annulled does not affect the truth that while unannulled it is a contract. The marriage contract may be dissolved, but until the innocent party elects to have it dissolved it continues.

If the arrangement between the State and the M. & E. R. R. Co. as stated in the supplements of 1865 and 1867 was repealable, and the State did not see proper to repeal it, the State could without the orderly procedure of assessment and valuation, but by a

mere suit on the contract recover one-half of one per cent. on the cost of the road, even though the value of the road was not half its cost; and the State could do this only because the tax arrangement was a contract.

If the arrangement were as intimated in the decision under review, the mere grant of a privilege by the State which could by the State be revoked, no suit could be maintained by the State if the corporation surrendered the privilege.

The State by placing on its statute book a statute reserving to itself the right to amend, alter or repeal acts conferring franchises on corporations, did not intend to divest itself of a most important power or ability, that of making contracts with corporations to be binding as contracts until the State saw proper to annul them. Such a purpose would be to seek to part with a power as valuable to a sovereign as to an individual, the power to contract.

The Supreme Court of New Jersey in The State vs. Miller, 1 Vroom, 370, when the question was pending whether the general tax law of 1862 did or did not repeal the stipulation as to taxes contained in the original charter of the Morris & Essex Railroad Company, says:

"That an act granting corporate privileges to a body of men, and expressly exempting them from taxation, becomes when accepted a contract, which is protected by the constitution of the United States from being impaired, is too well established by judicial decisions, by the action of the Legislature, and the acquiescence of the people to be questioned. But the weight of authority is equally decisive, that if the act reserves the right of repeal, the Company take the charter and the contract thereby implied or expressed, subject to such alterations as the Legislature may deem expedient."

It is undoubtedly the law that an act granting corporate privileges, even though repealable, is a contract until repealed.

In sustaining the position now taken that the stipulation contained in the supplements of 1865 and 1867, is an irrepealable contract, it is of course unimportant, whether a law granting corporate privileges is or is not a contract only when irrepealable; for the position now taken by me, is, that it is irrepealable, and so is of course a contract; but in considering presently the question whether the act of 1873 does repeal the supplements of 1865 or 1867, it is important to determine whether those supplements

contain a contract, for I think a much more stringent rule of construction exists as to the effect of a clause which is claimed to repeal a contract, and one claimed only to repeal a prior statute. And this Court in enforcing the provisions of the constitution, that contracts are not to be impaired, will adopt and enforce a rule of construction which will enforce the constitutional inhibition.

Why is the contract as to taxation contained in the supplements of 1865 and 1867 irrepealable?

We have shown the contract, and it is for the defendant in error to show that it has been annulled. And the defendant undertakes to do so,

1. By referring the Court to the supplement to the charter of the Morris & Essex Railroad Company passed in 1836, which says, "that *this* act and the act to which it is a supplement may be altered and amended."

But that provision does not reach the supplements of 1865 and 1867, which contains the contract in question. The charter did contain a contract as to taxation, but under the reservation of the right to repeal contained in the act of 1836 that contract was repealed.

The act of 1836 reserves expressly the right to alter or amend *that* supplement, and so it is not to be inferred that the reservation extends further than is expressly stated. This contract in question was made thirty years after the reservation contained in the act of 1836 was made, when the Company stood subject to general taxation, possessed no privileges and subject to no disabilities.

The act containing the new contract omits to make a reservation of the right to alter and amend, but on the contrary contains terms inconsistent with any such reservation. And we submit that the reservation of right contained in the act of 1836 to amend and repeal the contract contained in the charter of 1835, after that contract has been repealed, cannot in any fairness be construed to be part and parcel of the contract contained in the acts of 1865 and 1867.

Kent says, what all will accede to, that "The reservation is of no force unless it be part and parcel of the contract." (Kent Com., vol. 2, p. 306).

Maryland in consideration of a bonus gave certain banks franchises and a pledge "Not to impose any further tax or burden upon them during the continuance of their charters under this act."

Before the charters expired they were renewed and extended. This Court held that the exemption was irrepealable until the time the charter would have expired, but not longer. (Gordon vs. Appeal Tax Court, 3 How., 333.)

The Court held you could not take a part of one contract and weld it on to another contract. The reservation of right to repeal which in terms was restricted to the supplement of 1836, and the act to which it was a supplement having performed its office by the repeal of the contract of 1835, cannot thirty years after be resurrected to be interpolated into a contract which by its very nature and terms, as we shall see, was otherwise irrepealable.

But the defendants in error urge another statute as giving the State the right to repeal the contract contained in the acts of 1865 and 1867. In 1846 a general law was enacted in these words:

"The charter of every corporation which shall hereafter be granted by the Legislature, shall be subject to alteration, suspension or repeal in the discretion of the Legislature."

This provision has no effect on the charter of the M. & E. R. R. Co., for that was granted in 1835, and the law only affects charters granted after 1846. But it is claimed that it affects the supplements of 1865 and 1867, as they were subsequent to the act of 1846. Can either of those supplements by any fair and ordinary construction, such as the Court would adopt between two citizens, be held to be the charter of the M. & E. R. R. Co.?

The obligation of contracts may be as readily impaired by the forced and unreasonable construction of laws as by their ruthless breach by Legislative enactment; and we ask that the Court will prevent the violation of the contract in question by directing that neither of the supplements containing the contract is "The Charter of the M. & E. R. R. Co." If they are not, then the contract is not repealable by virtue of the general law of 1846.

We are referred by the Court below to Bouvier Law Dic. "Charter" for authority to show that the word charter means "a grant made by the sovereign securing the enjoyment of certain *rights*." And to Comyn Digest "Franchise," to show "that all franchises are derived from the King and ought to be claimed by charter."

This suggestion shows that the Court was not unobservant of the distinction between the mere grant of a right, and the charter of the corporation granted by the Legislature, and we think that they violate that salutary rule which says: "It is not allowed to interpret what has no need of interpretation," merely to force a construction that impairs a contract.

But if a grant of a franchise or of a right *be* a charter, a law fixing one-half of one per centum on the cost of a railroad as the tax the Company must pay, is neither a franchise or a right, but is an obligation and a duty imposed on the Company; and the exemption from further taxation is no more of a franchise or right, than that which every natural or artificial person enjoys in the security he possesses, that when a debt is paid once according to the contract, it need not be paid again.

But if this Court hold that the supplement of 1836, which reserves the power to alter or amend, or the law of 1846, reserving in the general terms referred to that power, authorizes the Legislature to repeal the contract contained in the acts of 1865 and 1867, yet those acts are irrepealable for two reasons:

First, It is irrepealable, because in 1865 when the contract was entered into by both parties, the M & E. R. R. Co could only be taxed under the general tax law according to the value of its property. And the contract of 1865-7 established a different basis of taxation, to wit: on the cost of their property without regard to its value, and the Company by reason of that contract, for years paid to the State, a tax on the basis and principle fixed by the contract.

The contract is an executed contract. The State has received the benefits, and the Company has borne the burdens of the contract, and it is too late for the State to say, "we now annul it."

It will not be claimed that if the State had a general law reserving the right to annul any contract, and if the State granted to a railroad company for a full consideration a right of way across its domain, the Company had constructed the railroad, that the State could then under its reservation to annul contracts, oust the Railroad Company and take possession. And why not? Simply because the reservation to annul contracts cannot be exercised so as to violate the laws of universal justice and right. And to annul contracts that are executed when one has received the benefit, and the other paid the consideration, would derange the affairs of

society. A constitutional law conferring rights or property, based on a consideration, is a contract *executed*.

Chief Justice Shaw, in Commonwealth vs. Essex County, 13 Gray, p. 253, says: "It seems to us that the power (that of altering and amending) should have some limit, though it is difficult to define it Perhaps the true rule is this: that when, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or right which have become vested under a legitimate exercise of the power granted."

Mr. Justice Clifford, in Millin vs. State, 15 Wall, 498, says: "Power to legislate founded on such reservations in a charter to a private corporation, is certainly not without limit. and it may be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such charter, and which by a legitimate use of the power granted, have become vested in the corporation."

State vs. A. James, 4 Missouri, 570.
Millin vs. N. Y. & E. R. R., 21 Barbour, 513.
Commonwealth vs. Canal Co., 66 Penn., 41.
Zabriskie vs. R. R. Co., 3 C. E. Green, 180.
Railroad vs. Teazie, 39 Maine, 587.
City of Erie vs. Erie Canal Co., 59 Penn., 174.

The act containing the contract was within the province of the Legislature to pass; the consideration the Company gave was an obligation to pay a tax on the cost of their property, no matter what might be the general tax laws of the State, or whether the value of their property should be only half its cost, and to do so perpetually, and the actual payment of such taxes.

That contract is executed, the Company has vested rights under it; it is property; and the Legislature under the reservation to alter, amend and repeal, has no more right to divest those rights or destroy that property, than it has under its original and general legislative power to destroy the rights and property of individuals.

The reservation confers on the Legislature no new or additional legislative power; the object of the reservation is only to exclude a conclusion, to retain its original, not to acquire additional powers.

Second. This contract is irrepealable because the Legislature when it was made agreed that it should be irrepealable; neither the act of 1865 containing the contract, or the act of 1867 con-

firming the contract, contains any reservation of a right to annul it.

The supplement of 1836 declares that *this* act and the act to which it is a supplement may be altered or amended when the public good requires.

The general law of 1846 declares that "The charter of every corporation which shall hereafter be granted by the Legislature shall be subject to alteration, suspension or repeal in the discretion of the Legislature."

The words of the contract are that one-half of one per centum on the cost of the road shall be in lieu and satisfaction of all other taxation and impositions whatsoever by or under the authority of this State or any law thereof, any law to the contrary notwithstanding.

The reservation of the right to alter and amend contained in the supplement of 1836, and in the general law of 1846, were mere statutory provisions; *they* had not the irrepealable character of a provision of the constitution. In some States the reservation is in the constitution; this is not. Now, the Legislature, for a valuable consideration, and to induce the Company to enter into the agreement, not only omit any reservation of right to alter and amend, but in the act submitted for acceptance declare that the contrat shall be perpetual, any law to the contrary notwithstanding; and it is only by virtue of the two repealable statutes then existing that there is any pretence that the contract contained in the acts of 1865 and 1867 is not irrepealable. It is only by virtue of those two statutes containing a reservation, that it is claimed that the act of 1873 affects the contract; and yet the contract submitted and accepted, itself declares that it shall be perpetual, notwithstanding those two statutes, and in fact notwithstanding the statute of 1873.

If it be true that a State must keep its faith—if it be true that a ***subsequent special*** law relating to the same subject matter overrides and pro tanto repeals a prior law, then it is true that the acts of 1865 and 1867 contain a valid contract irrepealable so far as the acts of 1836, 1846, and 1873 affect it, simply because the acts of 1865 and 1867 in plain, unequivocal words say it shall not be affected by those acts.

II. If the contract be repealable, I submit that the Legislature by the act of 1873 did not in fact repeal and did not intend to repeal it.

1. When a statute does not expressly annul a repealable contract, as it is admitted the statute of 1873 does not, every presumption is against the conclusion that the State has, against the will of the other contracting party, abrogated the contract.

It is assumed that an individual will keep his contracts even if by some unconscionable or technical plea it might be avoided, and the greater dignity of the State strengthens the presumption.

Unless this be the presumption, contracts most valuable to the State would by careless legislation be abrogated. As a State may not be charged with latches so it should not be charged by implication with waiving its contracts. The contract is made in express trust and should only be so unmade; nothing is easier than for the State by clear expression to declare that it proposes to exercise its rights of retiring from the contract.

2. The act of 1873 establishes a rule of taxation different from that contained in the acts of 1865 and 1867, and does not, as the Court below state, expressly repeal the contract.

The Supreme Court of New Jersey say, "The eleventh section of the act of 1873 declares that all acts and parts of acts inconsistent therewith are repealed. If the case rested solely on this repealing clause, "The State vs. Branin, 3 Zab., 485," and "The State vs. Minton, 3 Zab., 529," would be decisive on the subject." Meaning, as the Court will see, that if the case rested solely on the question whether the Legislature had expressly repealed the contract, those cases would decide that it had not. The State vs. Minton, was this: The tax law of 1851 (Laws of 1851, p. 272), provided by the second section, that ***all lands and personal*** estate owned by an individual or ***corporation*** should be taxed at their actual value, and the seventh section provided that the personal property of every ***incorporated company*** should be taxed in the township or ward where the principal office of the Company was, and the real estate where it was located. And the fourteenth section was that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." This law it was attempted to enforce against the M. & E. R. R. Co. That Company set up its special contract contained in its charter (Laws of 1835, p. 30, sec. 15) then unrepealed. It was afterwards by the general law of 1862. The Courts say that it is insisted that as the Legislature have reserved the right to re-

peal the special provision of the charter of 1835, relating to taxation, and that as the act of 1851 was inconsistent therewith, and as all acts inconsistent with the act of 1851 were by it repealed, that therefore the M. & E. R. R. Co. were subject to the act of 1851. That was insisted on, but the Courts said that the act of 1851 was not to "be *construed as embracing charters of private corporations, or as affecting privileges or immunities granted as such, even though they may be repealable.* The reasonable inference always is that when the Legislature intend to take away, then they will do it in express terms, and *e converso* when they do not do it in express terms, they do not intend to do it."

I state this case because the Courts below in making the decision now under review refer to it to show that the general repealer in the act of 1873 has not the effect of repealing the contract contained in the acts of 1865 and 1867. But I have referred to the case to show further that the act of 1851 was much more inconsistent with the then existing contract with the M. & E. R. R. Co, than the act of 1873 is with the now existing contract, and yet it was held not to be repealed. And I refer to the case for the further purpose of showing that this same Supreme Court of New Jersey then thought that when the Legislature wished to annul a contract with a private corporation, it would say so.

The Court below after stating that repeals are not favored, which is certainly true, after stating that the supplements of 1865 and 1867 are not expressly repealed, takes the ground *on which it decides the case*, that the act of 1873 is inconsistent with the contract contained in the supplements of 1865 and 1867, and therefore they are repealed.

If, as the Court tells us repeals are not favored, if the act of 1873 does not expressly repeal the acts of 1865 and 1867; if as the Court tells us when the Legislature intend to take away a right or franchise, they will do it in express terms, and e converso if they do not do it in express terms, they do not intend to do it; if the act of 1851, being entirely different from that of 1835, was held by the same Court not to repeal the act of 1835, we are at a loss to know how the Court concluded that the act of 1873, without any express words, and no more inconsistent with the acts sought to be repealed than was the act of 1851 with that of 1836, does repeal the acts of 1865 and 1867 containing the contract.

The truth is, that it is entirely illogical to say that two acts are inconsistent when they relate to entirely different subjects; here the acts of 1865 and 1867 relate specifically to the M. & E. R. R. Co., and the act of 1873 relates generally to the railroad companies of the State.

But waiving these considerations on the strength of which we, I submit, are entitled to a reversal, it will become apparent to the Court that the act of 1873 does not repeal, and was not intended to repeal the acts of 1865 and 1867.

The Court below says, that as the first section of the act of 1873 enacts that "all taxation upon all railroad companies occupying and using railroads in this State, whether as lessees or otherwise, shall be assessed thereunder; that every railroad is included, and if one to which the Legislature *could* apply this law (that is if one which has a repealable contract as to taxation) can claim that it is not within it, then every other can set up the same exemption." And this the Court says would render the act inoperative.

The Court below mistakes the object and intent of the law. A little examination will make it plain.

The Erie Railroad of New York, The D. L. & W. R. R., of Pennsylvania, The Pennsylvania R. R. of Pennsylvania, cross New Jersey, by means of leased roads. The Legislature tried the experiment of taxing their business, and after litigation it was held that they could not be taxed on a different principle than domestic corporations were taxed.—2 Vroom, 531. One object of the comprehensive words of the first section of this act, to wit, "All taxation upon all railroad companies ***occupying and using railroads in this State***, whether as lessees or otherwise, shall hereafter be made as follows," was clearly to reach these foreign corporations that were lessees of roads, and to do it without discriminating against them.

But while this was one object of the law, the words were broad enough to apply to, and do apply to all railroads in the State; to those that have no special contract it applies and to those that have a special contract repealable, and to those that have a special contract irrepealable it applies, but as to those having a special contract whether repealable or irrepealable it applies subject to the condition plainly stated all through the acts, that the railroad

companies that have special contracts, whether repealable or irrepealable, shall accept and agree to the act. The Court below says that the special contracts that are repealable are not expressly repealed by the act; but that it must be inferred that the Legislature intended to repeal them because of the universality of the language. Does not the sweeping language of the act also cover companies that had irrepealable contracts? The plain truth is, that the Court, without regard to the language, assumes that the Legislature intended to repeal the repealable contracts, because it had the power to do so, and not to repeal the irrepealable contracts, because it had not the power to do so, when the Legislature did not intend to repeal either.

Before looking at the words of the condition contained in the tenth section which qualifies the first section, let me call the attention of the Court to the fact that it is the usual mode of legislation relative to taxing corporations in New Jersey, and that too with companies that had no irrepealable contracts, for the Legislature to pass an act fixing the rate of taxation, and then add such words as these: "Provided that this section shall not go into effect, or be binding upon the said company, until the said company by an instrument duly executed under its corporate seal, and filed in the office of the Secretary of State, shall have assented thereto." We could point to many such provisions. One or two have incidentally occurred in this case. The Legislature seemed to have entertained some doubts, not without foundation, whether it was lawful for them without consent to impose a special mode and rate of taxation, and whether they had a right without consent to fix a perpetual rate, while the rate of taxation as to others was fixed from year to year, according to the exigencies of government; but whatever the reason, such has been the practice of the Legislature of New Jersey.

Now look at the act. It is important to look at the title of the act to find out its purpose, especially as the constitution of New Jersey requires that the object of the law shall be stated in its title. Constitution of N. J., Art. IV, Sec. 7.

The title is this: "An act to establish *just rules* for the taxation of railroad corporations, and to *induce their acceptance* and *uniform adoption*." That is not the name sane Legislators would give to a mandatory law.

The Court says the law was intended to be universal, and if one

company can avoid it, all can. It is true that these *just rules* were intended to be universal, and to apply to all; but on the condition that the companies having special contracts were *induced* to accept the rules submitted to them, as they had done before.

The preamble to act is this: "Whereas for the encouragement of railroad enterprise, laws creating and regulating railways in this State usually provide for the payment by them, *in consideration of their chartered privileges*, of a fixed rate upon their capital stock, or the cost of their works, in lieu of all public imposition whatever."

The Court says the first section, which fixes just rules of taxation for all railroads, does not apply absolutely to those having irrepealable charters, but that it applies to them only on their complying with the conditions of the tenth section, but that this first section applies absolutely and unconditional to companies having repealable contracts

The preamble immediately precedes the first section, and gives direction to it. And the preamble makes it apply with equal force to repealable and to irrepealable contracts. The Court claims that it applies to *repealable* contracts. And the preamble says in plain words that it applies to *irrepealable*, for it says that it applies to those companies that have agreed to pay the State a fixed rate on their capital "*in consideration* of their chartered privileges." Such a contract is irrepealable. If the first section applies both to repealable and irrepealable contracts, of course the condition contained in the tenth section applies to both classes of contracts. It must apply to one class or the other, or to both, and there is no authority to make any distinction between the two classes.

We insist that this first section means just what it says, as does every part of the act; it applies "to all railroad companies occupying or using railroads in the State." It applies to lessees—to those having no special contract—and to those having special contracts that are repealable, and to those having special contracts that are irrepealable—subject to the condition which is stated as clearly as the general enactment of the first section.

Section 10 of the act is with its preamble, in these words: "And whereas certain railroad corporations owning and occupying railroads in this State, claim exemption from all taxation, whether State, county or municipal, further than is provided by their charters, *or by special laws for their benefit now existing*,

which claims, if legal, subject such corporations to public ill-will, and make it their interest to forego the same, and agree to the *scheme of taxation*, hereby established: NOW, THEREFORE, be it enacted, that any such railroad corporation may, within six months from the approval of this act, make and execute, under their common seal, and signature of their President, and file in the office of the Secretary of State, a declaration in writing surrendering all claim to exemption from taxation by them heretofore had or made, and accepting the provisions of this act in lieu thereof."

This tenth section says that, "such corporations" as are described in the preamble which immediately precedes the section, shall have the benefit of this act, by within six months in an instrument under seal "surrendering all claim to exemption from taxation by them heretofore had or made, and accepting the provisions of this act in lieu thereof."

Will any one say that a railroad company that had an unrepealed special contract (even though it was repealable) had not in the language of the act, *theretofore made claim* to exemption for municipal and county tax? The object of the law was to induce them to surrender that claim. If New Jersey could by the exercise of its reserved power, break a contract from which she had received the benefit, she did not see proper to do so—and the Courts will not assume that she did see proper to do so.

But again, how does the act describe the corporations to whom this tenth section of the act shall apply, provided they file the surrender of their exemption and accepting the act? In these words and not otherwise: "Certain corporations in this State who *claim* exemption from all taxation further than is provided by their charter, *or by special laws for their benefit now existing*, which claims, *if legal*, subject such corporations to ill-will, and make it their interest to forego the same, and *agree* to the *scheme* of taxation hereby established."

The M. & E. R. R. Co. "claim exemption from all taxation further than is provided *by special laws for their benefit now existing*." Who can say that it does not come within the plain description of the tenth section?

And by the tenth section, it is submitted to these corporations whether they will "*agree*" to the "*scheme*," to the "*just rules*,"

the acceptance of which it is the object of this law "to induce," so as to secure "uniform adoption" of the scheme.

The first section applies to all railroads in the State, because it says so, but it so applies to corporations having special contracts, whether repealable or irrepealable, *only* on condition that they surrender their exemption, because the act says so.

And the Court had no authority when this contract speaks of companies having exemption by special laws, to interpolate the words "which are irrepealable," and by doing so destroy the whole harmony of the acts, and put New Jersey in the position of repealing special contracts, that it never intended to repeal.

Repeals are not favored. The presumption is that a State does not intend to abrogate its contracts. It is admitted the act of 1873 does not by expression repeal the special contract of the M. & E. R. R. Co. Give to each word of the act of 1873 its full force, and it is clear that while it establishes "just rules" or a "scheme" of taxation for all the railroads in the State, it scrupulously avoids forcing those rules on any company with which the State has made a special contract. And the law does not apply to such companies unless they are induced voluntarily to surrender their exemption. This the M. & E. R. R. Co. has not done.

Fred'k T. Frelinghuysen

U. S. Supreme Court.

JAMES S. YARD,
PUBLIC TAX COMMISSIONER,
—*ads.*—
THE STATE OF NEW JERSEY,
(THE MORRIS AND ESSEX RAILROAD COMPANY, *Prosecutor.*)

On Error
to
New Jersey
Court of Errors
and Appeals.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The prosecutor, The Morris and Essex Railroad Company, was created a corporation by the legislature of New Jersey, by act passed January 29, 1835 (P. L., p. 25); with power to build a railroad from Newark to Morristown.

By the 15th Section of the charter it was enacted that

> "As soon as the net proceeds of said railroad shall amount to seven per centum on its costs, the said corporation shall pay to the treasurer of this state a tax of one-half of one per centum on the cost of said road, to be paid annually thereafter, on the first Monday of January of each year; provided, that no other tax or impost shall be levied or assessed upon the said company."

By the 20th Section, it was enacted—

> "That the legislature reserve to themselves the right to alter, amend or repeal this act whenever they think proper."

A supplement to the charter, passed March 2, 1836 (P. L., p. 223), gave power to build a branch road and lateral roads, and (Sec. 6) repealed the 20th Section of the original charter; but (Sec. 7) enacted—

> "That the legislature reserve to themselves the right to alter or amend this supplement, *or the act to which this is a supplement*, whenever the public good may require it."

Between 1836 and February 14, 1846, three supplements to the charter were passed (February 22, 1838, P. L., p. 125; January 24, 1839, P. L., p. 22; March 1, 1842, P. L., p. 83), giving power to deviate; to increase par value of stock; and to borrow money and mortgage, and other powers. None of these supplements, however, made any mention of taxes, or of a right to repeal.

On the 14th February, 1846, (Nixon's Digest, "Corporations," Sec. 6, p. 168), a *general act* relating to corporations was approved.

This enacted that—

> "The charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature."

On February 25, 1846, (P. L., p. 57,) a supplement to the prosecutor's charter, giving power to build another lateral road, and extending the time for completing branch roads, was approved.

To carry into effect this act and a former supplement, the company was invested with the powers of the original charter, "and subjected to the several restrictions contained in said acts."

The third section of this act enacted

> "that the legislature may alter or amend this act whenever the public good requires it."

On February 19, 1851, (P. L., p. 28,) another supplement to the charter was approved, giving power to extend the road to the Delaware river, and other powers; with a clause (Sec. 2) by which, for the purpose of carrying into effect the objects of the supplement, the company was invested with all the powers before given to it, "and subjected to all the duties, restrictions and liabilities contained in said acts."

On March 10, 1853, (P. L., p. 416,) another supplement was approved, giving power to connect with the New Jersey Railroad.

On March 3, 1854, (P. L., p. 260,) another supplement was approved, giving power to widen the road in Essex County, and extend it to the Passaic river, with a clause conferring—for the purpose of acquiring the lands necessary, and for no other purpose—the powers of original charter and supplements, "subject to all the other restrictions and limitations therein contained."

On March 6, 1855, (P. L., p. 177,) another supplement was approved, giving power to build a branch road to Phillipsburgh, on Delaware river, and company was invested—for the purpose of constructing the branch—with all powers given by original charter, "and subjected to all the duties, restrictions and limitations contained therein;" and "provided, nevertheless, that nothing in this act shall be taken or construed to exempt or release the said company from taxation on their said road, as constructed under the original act, to which this is a supplement, or on the continuations of the said road, as constructed under and by virtue of the several supplements to the said original act, or on the branch road permitted to be constructed under and by virtue of this act, according to the true intent and meaning of the said original act, and of the several supplements thereto."

On March 6, 1857, (P. L., p. 111,) another supplement was approved, giving power to extend the road to New York bay, and by the seventh section the company was—for the purpose of carrying into effect the objects of the act—invested with all the powers of original act and supplements, and "subjected in respect to said road and the construction and use thereof to all the duties, responsibilities, restrictions and provisions contained in said *acts*."

On March 13, 1861 (P. L., p. 314), another supplement was approved, extending the time for completing the road to Phillipsburgh; altering the points from and to which the lateral roads before authorized might be built, and company was for those purposes invested with all the powers granted by the original charter and supplements, and "also subjected to all the duties, responsibilities, restrictions and provisions contained in said *acts*."

On March 28, 1862 (P. L., p. 344), a *general tax act* was approved. By Section 8 it was enacted—

> "That all private corporations of this state, except those which by virtue of any irrepealable contract in their charters or other contracts with this state, are expressly exempted from taxation, shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in, and accumulated surplus."

By Sec. 13 it was enacted—

> "That the real estate of private corporations situate within this state shall be assessed to said corporation in the township or ward in which it is located, in the same manner as the real estate of individuals; *and the amount of such assessment shall be deducted* from the amount of the capital stock," &c.

The 21st section expressly repealed all

> "acts and parts of acts, whether special or local, or otherwise, inconsistent with the provisions of this act."

This general act was construed in 1863 and 1864, with reference to the rights of the Morris and Essex Railroad Company, in 30*th N. J. R.* (1 *Vroom*), 370, *and* 31*st N. J. R* (2 *Vroom*), 521, 574.

On the 12th April, 1864 (P. L., p. 710), another supplement to the prosecutor's charter was approved, ratifying an agreement with other companies, and making the supplement itself liable to a special tax or fee, provided for by an act of 1858, with a view to pay legislative expenses. This act of 1858 made any private act void on which such tax was not paid. (*Nixon's Digest*, 915, *P. L.*, 1858, *p.* 220.)

Another supplement was approved on the 23d March, 1865 (P. L., p. 555).

It authorizes a branch road through Boonton and to Paterson; "and for these purposes" empowers the company to exercise all the powers and franchises given by original act and supplements,

> "Subject, however, to all the restrictions, limitations and conditions of said original act and supplements which may be applicable to the powers and *franchises* hereby conferred."

The third section of this act is the one chiefly in question in this cause.

It enacts—

> "*That the* tax of one-half of one per cent., provided by their said original act of incorporation, to be paid by the said company to the state, whenever the net earnings of the said company amount to seven per cent. upon the cost of the road—shall be paid at the expiration of one year from the time

> when the road of the said company shall be open and in use to Phillipsburgh, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this state or any law thereof; provided that this section shall not go into effect or be binding upon the said company until the said company, by any instrument duly executed under its corporate seal and filed in the office of the secretary of state, shall have signified its assent hereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

The fifth section enacts that the act shall take effect immediately.

The company filed, in due time, a paper under its seal, which recites in full the whole of the third *section;* and that the company had received a copy of the *act* and considered it; and then declares:—

> That "in consideration of the terms and conditions of the said supplement, and more especially of the third section thereof, it has assented and does hereby assent to the said act; and has agreed and does hereby agree to be subject to the provisions of the said act, and to pay the tax therein named, as therein specified."
>
> [See copy of act and assent annexed.]

On the 11th April, 1866, (P. L., p. 1078, and Nixon's Digest, 951,) a new general tax act was passed, which (Sec. 2) imposed a tax on all the real and personal property owned by individuals or corporations. It exempted (Sec. 5, sub-div. II,) the *stock* of any corporation which, by charter or other contract with the state, is expressly exempted from taxation; and also the *stock* (in hands of stockholder) of any corporation of this State the *capital* whereof is *by this act* made taxable to and against the corporation (itself).

Sec. 15 taxed all private corporations on their capital, except banking institutions, and except those which, by virtue of any contract in their charters or other contracts with this state, are expressly exempted from taxation, and except mutual insurances.

By Sec. 16 the stock of banks was to be assessed to stockholders.

By Sec. 32 various acts were repealed, among the rest the general tax act of 1862; and "*all other acts or parts of acts*, whether special or local or otherwise inconsistent," &c., were repealed, "*except such special* or *local acts as shall have been approved since the year* 1862."

This left unrepealed the prosecutor's supplement of 1865, except in Jersey City. But this section had a proviso in it, "provided that the supplement to the charter of Jersey City, approved March 29, 1866, and the acts and parts of acts thereby reinstated, shall not be affected by this act." The Jersey City act of 1866 (P. L., p. 880, sec. 2,) enacts "that no real or personal estate in said city shall be exempt from taxation."

On the 5th of March, 1867, (P. L., p. 144,) another supplement to the charter was approved, reciting that the company had lately extended its railroad from Hackettstown to Phillipsburgh, and then giving power to increase its stock and to straighten its road, and declaring that the company for this purpose should be invested with all the powers conferred by the charter and supplements, "subject to the duties and liabilities thereby imposed."

The third section of this act of 1867 enacts—

> "That no tax by or under the authority of this state shall be imposed upon any property purchased, held or used by said company for the purposes of their charter, or any of the supplements thereto; except the tax of one-half of one per centum on the cost of their road, which, by the

> said charter and the supplement thereto approved on the twenty-third day of March, eighteen hundred and sixty-five, was *required* to be paid by said company in lieu of all other taxes, any act to the contrary notwithstanding."

No formal acceptance of this act was provided for or given.

On the 9th of February, 1869, (P. L., p. 28,) another supplement was approved; reciting a lease by the company of all its franchises and property to the Delaware, Lackawanna and Western Railroad Company, and ratifying the lease—

> "Provided that nothing contained in this act shall prevent the legislature from having the same control and authority over the property and franchises leased as aforesaid, that they now have over the Morris and Essex Railroad Company."

On the 14th March, 1870, another supplement was approved; giving power to increase capital stock. (P. L., p. 513.)

On the 21st March, 1871, (P. L., p. 588,) another supplement was approved; giving power to make an open cut or tunnel in Bergen hill; and (sec. 3) for the purpose of carrying into effect the act, the company is vested with all powers given by original act or supplement—

> "And also subjected to all the duties, responsibilities, restrictions and provisions contained in said acts."

On the 5th of April, 1871, (P. L., p. 1,288,) another supplement was approved; enacting that no previous supplement or amendment to original charter since January 9th, 1871, should be construed to authorize the company to vary its route in Paterson city.

On the 2d April, 1873, (P. L., p. 112,) the *general tax act*, which is impeached in this case, was passed. This act is entitled,

> "*An act to establish just rules for the taxation of railroad corporations, and to induce their acceptance and uniform adoption.*"

It has a recital in the preamble and another in the tenth section.

The first recital is that—

> "For the encouragement of railroad enterprise, laws creating and regulating railways in this state usually provide for the payment by them in consideration of their chartered privileges of a fixed rate upon the capital stock, or the cost of their works in lieu of all other public impositions whatever; that it is nevertheless contended that the property of such corporations, being largely acquired for or through the growth and extension of their prosperity, should contribute to the charges and expenses essential for municipal and county purposes; that it is desirable, in order to the avoidance of litigation and future dissatisfaction, that such municipal and county taxation shall be authorized and that the same shall be permanently fixed and regulated."

Therefore it is enacted (Sec. 1)—

> "That all taxation upon all railroad companies occupying and using railroads in this state whether as lessees or otherwise, shall hereafter be made as follows: *First*, Such companies shall pay upon the cost, equipment and appendages of said railroads respectively, a state tax *after* such rate of taxation as may have heretofore been fixed by law upon such companies, or in default thereof after the rate of one-half of one per centum upon such cost. *Second*, A tax of one per cent. on the value

> of the corporations' real estate (except the track and ten acres at the termini) for the benefit of the counties and municipalities in which it lies; but payable to the collectors of the townships and and cities."

The *valuation* is to be the basis of county and municipal taxation.

The *cost*—the tax on which goes to the state—is to be reported by the officers of the company; but the value of the real estate, on which the counties and municipalities receive a tax, is to be ascertained by a tax commissioner.

After making various provisions as to this valuation, and the salary of commissioner, the act (sec. 9), makes the corporation liable for city improvements which are beneficial to its property, (except the track and the ten acres and the equipments and appendages,) for the purposes for which it is used; but the laws relating in other respects to such city improvements not to be altered.

Then comes a second recital (Sec. 10)—

> "That certain railroad corporations, owning or occupying railroads in this state, claim exemption from all taxation, whether state, county or municipal, further than is provided for by their charters, or by special laws for their benefit now existing; which claims, even if legal, subject said corporations to public ill will, and make it their interest to forego the same and agree to the scheme of taxation hereby established."

And then (Sec. 10), it is enacted—

> "That any such railroad corporation may, within six months, surrender all claim to exemption, and accept the provisions of the act in lieu thereof."

And then (Sec. 11)—

> "All acts, and parts of acts inconsistent herewith be and the same are hereby repealed, and the act is to take effect immediately."

[*See the whole act; a copy of which is annexed.*]

The tax commissioner made the statement and valuation required by the act, with respect to the Morris and Essex Railroad Company's real estate. By this it appears, that the real estate of the prosecutor, to the amount of $2,089,520, is subject to a tax of one per cent. for each of the three years, 1873, 1874, and 1875, for the benefit of the counties and municipalities where it is situate.

This valuation was removed to the Supreme Court of New Jersey by certiorari; and the reasons assigned for setting it aside were four: 1st. The commissioner had no power to make the valuation. 2d. The act of 1873 does not apply to the prosecutor. 3d. If it does apply, it impairs a contract of the state with the prosecutor. 4th. General illegality and violation of vested rights of prosecutors.

The contract said to be impaired is alleged to have been created, by the said third section of the supplement to the company's charter, approved March 23d, 1865, and by its acceptance by the company under its seal.

POINT I.

The Morris and Essex Railroad Company—unless it has an irrepealable contract with the state—was intended by the act of 1873, to be subject to the new taxes, though it did not assent and agree to the act, in the manner provided for, for "certain" corporations, mentioned in the preamble to the 10th section.

The state maintains that the act of 1873 divides railroad corporations into two classes; one class having a repealable exemption or no exemption; and the other an irrepealable exemption.

The first class is subjected to the state and municipal taxation without allusion to their consent. The second class is not subjected to the act, but provision is made for their subjecting themselves to it by a formal approval of the act by a declaration in writing, surrendering the exemption and accepting the provisions of the act in lieu thereof.

There could be no doubt of the legality (*i. e.* validity) of a mere exemption which the legislature itself had created, whether by charter or special law; or, for that matter, by general law—so as to protect the company from the *assessor;* but the "claim" referred to in the preamble to the 10th section, is a claim, that the *legislature itself* cannot tax the companies "further than is provided by charter or special laws then *existing.*" Such a claim as this could only arise upon a *contract,* in restraint of the legislature itself; it could have no other basis. The only possible question, as to the legality of

a claim against the legislature itself, based on contract, must have been the illegality of a legislature so tying up its hands.

The recital in the 10th section—its form and substance being considered—is an admission that the claim alleged, was that the *legislature's* hands were tied; and, as they could be tied only by what—in the New Jersey tax acts (see ante-general act of 1862)—is called an irrepealable *contract*—a "claim" under an irrepealable *contract* is recited.

That there is nothing in the doubt of the validity of such a contract, only makes it more plain that a contract was referred to as creating the "*claim.*"

Which are these "certain" railroad corporations whose claim makes them obnoxious to public ill-will, mentioned only in the preamble to the *tenth section?*

Which are the railroad corporations spoken of in the preamble to the *act* itself?

I think it plainly appears on the face of the act of 1873, that the state had two purposes in the act: The first was to "*establish*" just rules for the taxation of railroad corporations. This *could* be done; as to all those with reference to which it was not controlled by an irrepealable contract—by simply enacting the "just rules."

The *rules* being intended to be imposed where they could be, and agreed to where they could not, were necessarily made for "*all railroad corporations.*" Therefore, in enacting the rules, *all* railroad corporations are the subject—and that they shall pay the new taxes is the predicate.

The rules are wholly contained in the first section. The next eight sections relate to the machinery to put in force the rules.

The rules being *established* by the first section and the details of their execution by the next eight sections, the *second* purpose of the act of 1873 was, as the title of the act says, "to induce their acceptance and uniform adoption" by "certain" corporations.

The tenth section recites that there are "certain" railroad corporations which claim an exemption from further taxation than is provided in their charters, or by special laws for their benefit then existing. The word "further" is not in the right place in the act to make this sense at once apparent, but the meaning is as above stated.

These special laws which were not described as original charters,—if they are not supplements,—must be such as "an act relative to the Camden and Amboy Railroad," passed February 4, 1831 (appendix to P. L. of 1849, p. 28 and 29), which reduced the *transit duty* and made it payable only on passengers who crossed the *whole state;* and, more prominently, perhaps, such as the act of 1869 "an act relative to transit duties" (*P. L., p.* 226, 1487 *and* 1488).

The latter is a special law "*now existing.*"

I know of no other special laws of this description, although there may be others. But it is not pretended that any act coming within this description of "special laws," —other than its charter and supplements,—contain any exemption in favor of the prosecutor.

By including all railroad corporations in the taxing section (the 1st); and providing in the 10th section for the consent of "certain" corporations, an intent is undoubtedly manifest, to *bring* "all" within the act, in some manner.

While the tenth section provides for the consent of "certain" corporations; and thus imports an intent *not* to compel them to pay the new taxes, unless they consent;

it by no means follows, that it was not the intent to *compel* other railroad corporations not referred to in the preamble to the 10th section, to pay the new taxes, whether they consented or not.

If the corporations mentioned in the preamble to the *act;* corporations which "the law creating and regulating" had imposed a tax upon, at a fixed rate, or had not taxed at all; were not to be taxed at the new rate, unless they first claimed the exemption mentioned in the preamble to the 10th section, and then under the 10th section itself, surrendered their claim; the *preamble* to the 10th section is without any significance—it is entirely useless.

Yet this preamble is so referred to in the 10th section, that it becomes a part of the *enactment.* The "claim" meant was a valid claim to exemption.

Proprietors of Bridges vs. Hoboken Co. 13 *N. J. Chy,* (2 *Beasley,*) 98, 99.

It would have been quite absurd to put the preamble to the 10th section, only there; and designate the corporations whose consent was solicited as "certain" corporations, if every railroad company was to be free from taxation under the act of 1873, as soon as it should make a *claim,* valid or invalid, which it should make for the first time after the passage of the act of 1873.

To give the act of 1873 this construction would make it an invitation to all corporations who had repealable charters, to make a new claim. If they made it and did *not immediately waive it,* they would then be outside of the operation of the law of 1873. This could not have been the invitation of the state. It was well known that there were irrepealable charters, which secured some corporations from the operation of general tax laws, and this had been recognized in many laws—notably in the general acts of 1862 (P. L., p. 349, sec. 8) (ante p.) and 1866 (*Nixon's Digest* 951, *sec.* 5 *and p.* 954, *sec.* 15) (ante p.).

The truth is, the state, in 1864, adopted a policy on this subject, and shewed a distinct intention to pass at some convenient time, a general act, taxing all railroad corporations, and getting rid of all repealable exemptions; and in that year and after, I believe nearly every *original* act of incorporation of a railroad contained this clause, after providing for a tax of one-half per cent. on the cost—

> "And such other taxes as may be assessed from time to time by a *general* railroad law, applicable to all railroads *over which the legislature shall have power* for that purpose; and no other tax shall be levied on such company."

This is the case with sixteen companies at least—the Rocky Hill road (P. L., 1864, p. 654); with the Pemberton road (P. L., 1864, p. 469); with the Bridgeton road; with the Red Bank; Monmouth & Middlesex (P. L., 1865, p. 548 and 683); Camden & Burlington; Swedesboro'; Mount Hope (P. L., 1866, pp. 19, 96, 314, 690); with the Farmingdale (P. L., 1867, p. 574); with the New York & Long Branch (P. L., 1868, p. 852); with the Ferromonte (P. L., 1869, p. 601); with the Newark & Hudson; Mercer & Somerset; New Egypt (P. L., pp. 1280, 913, 480); with the May's Landing R.R. (P. L., 1871, p. 678), and with the Bound Brook (P. L., 1872, p. 314).

It was not necessary to repeat this in the Morris & Essex act of 1865, as the courts had only three months before held that this company had not an irrepealable charter.

1 Vroom, 370; 2 Vroom, 521, 574.

The 1st section of the act of 1873 shows that some of the corporations, which are referred to in the preamble to the *act*, had been taxed by the "laws creating and *regulating* them;" on the "cost of the road, *equipments* and appendages;" for such corporations are to continue to pay at that rate; but if the laws "creating and regulat-

ing" them fix the tax on the cost of the road only--(and not of the *equipments* and appendages)—they were to pay the new tax, and not the old.

[See distinction between appendages and equipments, State Treasurer *v.* Somerville R.R., 4 Dutch., 26, 27, 28.]

The Somerville and Easton R.R. was one instance in which the company paid on the cost of the road and appendages, and not the equipments. (*Ibid.*)

There are several other instances. The Morris and Essex (as its original charter shows, and the supplement of 1865, also) paid only on the cost of the road, and not the equipment. So the Red Bank & Monmouth, and Middlesex (P. L., 1865, p. 548, 683) pay on the cost of the road only.

All the last mentioned original charters of incorporation, granted in 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871 and 1872, except two, are instances of companies being required to pay a tax on the cost of the road, appendages and *equipments*.

The preamble to the *act* of 1873 shows (even when considered alone), that some railroad corporations were taxed at a fixed rate on the stock or works—"by laws creating or laws *regulating* them." But the preamble to the 10th section alludes to "certain" corporations without saying on what their tax was rated.

Must not the second preamble mean "certain" *others* than those mentioned in the first preamble? Does it not mean such as were taxed at a rate on some other thing than the stock, works, equipments or appendages, or by some act other than laws *regulating* them; as, for instance, by "their charters or by special laws for their benefit now existing"—must it not (the second preamble) refer to corporations whose tax the legislature could not "regulate?"

The first preamble speaks of the corporations intended to be included in it as corporations whose tax had been "regulated," which could not be the case where there had been a contract as to taxation. The second preamble speaks of corporations who, it would appear, from their consent being provided for, claimed that their tax could not be regulated.

But a further consideration of a few of the most prominent *public* acts of incorporation will set this classification of corporations, in the act of 1873, into those who had irrepealable contracts, and those who had not, in a clearer light.

The charter of the Camden and Amboy Railroad Company, and of the Delaware and Raritan Canal, and of the New Jersey Railroad Companies (afterwards known as the United Companies, and now leased to the Pennsylvania Railroad Company), are all published in an appendix to the pamphlet laws of 1849, though passed in 1830 and 1832, respectively. (*See, also, pamphlet laws of* 1830, *p.* 73 *and* 83, *and P. L. of* 1832, *p.* 96.)

By the canal act of 1830 (*appendix, P. L.*, 1849, *p.* 16, *Sec.* 26) a *transit duty* of eight cents per passenger, and eight and two cents per ton of freight (according to its nature), is imposed on that company; and it is enacted "that no other tax or impost shall be levied or assessed upon the said company."

By the Camden and Amboy R. R. act of 1830, (*appendix P. L.* 1849, *p.* 26, *Sec.* 23) a *transit duty* of ten cents per passenger and 15 cents per ton is imposed on that company; and it is enacted "that no other tax or impost shall be levied or assessed upon the said company."

This transit duty on passengers was altered so as to make it apply only to passengers carried all the way across the state. This was done by "*an act relative to the Camden and Amboy R. R.*" Feb. 4, 1831. (*Appendix to pamphlet laws*, 1849, *p.* 29, *sec.* 3.) This is one of "the special laws for their benefit, now existing."

This was not a supplement to the charter, although it was not to be in force unless accepted by it. Sec. 5, p. 29 and 30. This transit duty was abolished altogether in 1869, by the consent of the companies; but they were to pay a tax of the same amount as the transit duties forever. (P. L. of 1869, pp. 226, 1487, 1488), unless one-half of one per cent. amounted to more; and then the greater amount.

By the New Jersey R. R. act of 1832, (*appendix P. L. 1849, p. 69, sec. 18*), a tax of one-quarter of one per cent. for ten years, and after ten years, of one-half of one per cent. on the capital stock was imposed, but when the road connected with a through line across the state, it was required to pay a *transit duty* of 8 cents a passenger and 12 cents a ton.

> "And that no other or *further* tax, or imposition shall be levied or imposed upon the said company."

Neither of these three charters contained any provision permitting the legislature to alter or repeal them; nor was the general act permitting the repeal of all future charters enacted till 1846, and the charters were in 1830 and 1832. Each of these acts is declared to be public.

The New Jersey Railroad connected with a through road before 1842, and became subject to the *transit duty tax.* (P. L. 1849, appendix, p. 66, joint resolution.) These acts are, and always have been considered as containing irrepealable contracts.

Every act relating to the taxation of these companies has required the consent of the companies, and the consent has been given; and the same is the case with many of the supplements which did not relate to taxation. (Appendix to *P. L.* 1849, Camden and Amboy and Canal Co., p. 31, 33, 34, 40, sec. 6, 41, certificate, 4, 6, 47; New Jersey R. R. Co., p. 63 and 64, sec. 3, and p. 64, 65 and 67; sec. 3, p. 68 and 69; sec. 3, and p. 69 and 70.)

The act of 1854 limiting the monopoly of Camden and Amboy R. R. and Canal Co. to 1869, recites that all the charters are *contracts;* and the 7th section requires the consent of the companies, and declares the publication of the assent to be evidence. The assent was given. The act and assent are in P. L. 1854, p. 387, 389 and 551.

The act of 1869 which got rid of *transit duties* as such; but fixed the tax of the companies at the total amount of transit duties paid that year, if a rate of one-half one per cent. did *not* amount to that; and at that rate, if it would *exceed* the amount paid for transit duties that year, required the acceptance of the companies, and was accepted. (P. L. 1869, p. 226, 1487 and 1488.)

The acts above mentioned and the declarations therein contained as to the charters being contracts, and the provisions therein as to taxation, make it apparent that these three companies, two of which were railroad companies, had irrepealable contracts, and that these must have been the corporations who were to be "induced" (as the title of the railroad tax act of 1873 says) to accept the scheme of that act. Without their assent this general tax would not bind them.

This accounts for the preamble to the tenth section of the act of 1873. An adequate cause being discovered for the tenth section, no other need be searched for.

Nor are the charters of these corporations alluded to in the preamble to the first section of the act of 1873 by the words "whereas laws *creating and regulating* railways * * usually provide for the payment * * of a fixed rate upon the capital stock or the cost of their works in lieu of all other public impositions."

The laws creating these corporations did not so provide. Nor have these companies ever been *regulated* in the matter of taxation. Whatever has been done to alter their taxation has been by special *contract* with the state, as appears by the references above contained.

The New Jersey Railroad charter provided for a fixed rate *and* transit duties *also* (appendix to P. L. 1849, p. 60, sec. 18, p. 65, 66, 67).

No other *railroad* corporation in the state has ever pretended to have an *irrepealable* contract with the state, not even the prosecutor, until the certiorari was brought in this case.

This prosecutor did pretend in 1863, before its supplement of 1865, that the general tax act of 1862, should not be construed to repeal the provisions in its charter and supplements as to taxation, but the court held it did. There was no pretence of possessing an exemption which the legislature *could* not withdraw, and subject the company to general taxation; if the intent was clear (State, Morris and Essex Railroad prosecutor *v.* Miller, 30 N. J., 1 Vroom 368; S. C. on Error 31 N. J. 2 Vroom 521;) the prevailing opinion in which latter case is not published with the case (page 530), but the reasons are given in 31 N. J. (2 Vroom) 577, 588.

Here, then, we have railroad corporations which have never been "*regulated*" as to taxation. The taxes have been a matter of contract. We have railroad corporations, the charters of which did not provide for a *fixed rate* on the *capital stock* or cost of works. (The N. J. R. R. charter, providing for tax on capital *and* transit duty.)

But corporations which have been "*regulated*" as to taxation, and corporations the charters of which provided for a *fixed rate* on the capital stock or cost of works are in the class mentioned in the preamble to the first section of the *act*.

Every other railroad corporation in the state, except the two (Camden and Amboy, and New Jersey) pay a fixed rate on the cost of the road, or on that and the cost of equipments and appendages, or on the capital stock. This has already appeared.

The prosecutor *has* been *regulated* as to taxation; and has paid taxation under the general act of 1862. (1 Vroom 370, S. C., 2 Vroom 521, 577, 578) though that imposed a tax exceedingly different from the prosecutor's charter.

It was provided in the prosecutor's charter that it should pay on the cost of its road.

Indeed the prosecutor has another ear mark of belonging to the first class, derived from the expression used in the very supplement of 1865.

The act of 1865, sec. 3, says the tax shall be "*in lieu*" and satisfaction "of all other" taxation or "imposition whatsoever," by or under the authority of this state, or any law thereof. (Ante p. .) The Camden & Amboy and N. J. R.R. acts do not use this expression.

The preamble to the general act of 1873 (not the preamble to sec. 10) says, that the tax in the charters it refers to, have usually been "*in lieu* of all other impositions whatever." The same words, "*in lieu* of all other state taxes," are in the Long Branch and Sea Shore Railroad's charter of 1863, (*P. L.* p. 423); and "*in lieu* of all other taxes," is in the Sea Island Railroad charter of 1872 (*P. L.*, p. 1,033): both of which are undoubtedly liable to the act of 1873, and within the first class mentioned in the preamble to the act itself.

The act of 1867 also—a supplement to the prosecutor's charter, uses the phrase, "*in lieu*," etc., of all other taxes. (Ante p. .)

Must not a corporation, so plainly, in all its attributes, agreeing with the description of those mentioned in the preamble to the *act* of 1873, and differing in these very particulars from those which are (but by other indications) plainly described in the preamble to the 10*th section* —must it not belong to the first class—and was it not

intended to be included in that class? If it does belong there, it does not belong to the second class—that mentioned in the preamble to the 10*th section*, unless it has an irrepealable contract as to taxation.

It was maintained in the court below, that the act of 1873 did not repeal all *special* acts—as the former general tax laws did when it was desired to repeal the repealable exemptions. This is true; but this act relates to nothing else but railroad *corporations;* and refers, by the first preamble, to all railroad corporations not included in the second preamble (Sec. 10), and in the second preamble to those not included in the first.

Under these circumstances there cannot be a doubt that it was not necessary to repeal special acts; but the general repeal of all acts and parts of acts inconsistent with the act of 1873, was enough to show a clear intent to repeal whatever charters were repealable; and as to those that were not repealable, it is plain the act was not to take effect unless they formally and deliberately consented.

POINT II.

The act of 1865, and its acceptance, create no irrepealable contract with the state as to taxation.

A charter and its acceptance make only an *implied* contract not to take away the thing, immunity or privilege granted.

The contract implied is not in the express words of the grant in any case, where, as here, the grant is—an executed contract.

Story and Washington, J. J. in 4 Wheat, 684, 689, 658.

State *v.* Mayor, 2 Vroom, 580, 581.

The contract is implied from the *circumstances* of the case.

Ch. J. Marshall, in Dartmouth College case, 4 Wheat, 627.

In this case the original charter reserved the amplest power of repeal (see ante p. 2).

The next act repealed it, but supplied its place by giving power to alter or amend the charter or supplement (see ante p. 2).

The act of 1846, passed nineteen years before the supplement of 1865, declares that the charter of every corporation thereafter granted, shall be subject to alteration, suspension and repeal, in the discretion of the legislature (ante p. 2).

The statement of the case shows three distinct provisions as to alteration and amendment, and two as to repeal (ante p. 2, 3, 8). The case shows repeated declarations of the legislature again, and again, and again (nine times), in almost every supplement to the charter—that the company, in exercising each additional power given by such supplement, shall be subject to all the *liabilities, conditions and restrictions* of the original charter, and of every previous supplement (ante p. 2, 3, 4, 5, 7, 8). The case shows that this clause was repeated in the very act of 1865 (see ante p. 5); it shows that this company was excepted from the operation of the general tax act of 1866 (except as to Jersey City) only by a provision, which excepted from repeal all special laws after 1862 (ante p. 7); it shows that by a proviso in the general act of 1866, a taxing power to Jersey City was preserved and from the Jersey City power the only exemption was the act of 1867; it shows that in 1867, after the supposed contract of 1865, the company again sought and obtained further powers, and a recital was made that it had completed its road (P. L., p. 7), and the exemption of 1865 was re-enacted with a recital that the tax was a

tax which by the charter and the supplement of 1865 was *required* to be paid by the company in lieu of all other taxes (ante p. 7), and the company was to be subject to the old duties and liabilities; it shows that in 1869, when confirming the lease to the Delaware, Lackawanna and Western Railroad Company, the state reserved the same control and authority over this company, and its *property* and franchises, as it had of the Morris and Essex Company (ante p. 8). This reservation is very significant.

This subjection to the old liabilities, by the supplements giving new power, operates to make each supplement repealable; and the clause, being repeated in the act of 1865 (ante, p. 5) it makes that and the whole of it repealable.

It is said that these clauses "subject," &c., to the old liabilities in each supplement and in the very act of 1865, is only subject to them *in the exercise of the new powers* granted by the supplement.

The clause does not say this. The act of 1865 grants the new powers—subject to the old conditions so far as applicable to the franchises *hereby*, *i. e.* by the whole act granted. The words "subject," &c. have simply the effect of incorporating the *words* of the condition contained in the original act and supplement into the clause. These words being introduced would make the clause "subject," &c., read: "The legislature reserve to themselves the right to alter, amend, or repeal this *act* whenever they think proper;" or, "the legislature reserve to themselves the right to alter or amend *this supplement*, or the *act* to which this is a supplement whenever the public good may require it" (*see page* 2). The words of the first section of the act of 1865 "subject to all the conditions of the original act and supplements which *may be applicable* to the powers and franchises *hereby* conferred," show that there could hardly have been an intention to confine the condition of repeal to that section. The condition of repeal might be ap-

plicable to the exemption, for the exemption is a "franchise" granted by the act. One of the definitions of franchise is "immunity from tribute."

Jacob's Law Dictionary *verb.* Franchise.

The word "franchise" has been held in *assignments* not to mean immunities, but as the court say in the case so deciding "all we now decide is, that such immunity is not itself a franchise which *passes* as such without other description to a purchaser."

Morgan *v.* Louisiana 3, Otto 224.

If there had been an intention to confine the condition of repeal to the first section, the word "hereby" would have been "hereinbefore" or "by this section."

The word "hereby" refers to the *whole act*, which indicates that the draughtsman intended to convey the meaning that all conditions were incorporated by the clause "subject," &c., which were "applicable to any franchise conferred by the *act;*" and undoubtedly the word "hereby" aided to convey the meaning—that as the old condition of repeal is a condition that "may be applicable" to the whole act, the whole act and not the first section only, was subjected to it; and so it was without this aid—on the principle that the adoption of a condition in an act or supplement by reference, incorporates the words of the condition contained in such act or supplement; which being done in this case—the clause will read "subject to the condition that the legislature reserves to itself the right to alter or amend this *supplement*" (ante p. 2).

Even without the clause "subject," &c., in the first section of the act of 1865—that whole act is but a supplement to the charter and the supplement of 1836.

The supplement of 1865 partakes of the character of the original act and the supplement of 1836. In contemplation of law, the original act and supplement are one

act for the purposes of construction. If they are *public*—the act of 1865 is. If they are repealable, so is the act of 1865.

Newark City Bank *v.* Assessor, 1 Vroom, 22.

The words "*this* act," used in an original act, means the supplement as well as the original act.

Newark City Bank *v.* Assessor, 1 Vroom, 22.

Held, also, if original charter is public, all supplements are.

Bank of Utica *v.* Magher, 18 John, 344, 345.
State *v.* Bergen, 5 Vroom, 439.

But irrespective of any clause in the act of 1865, the general act of 1846 makes the 3d section of the act of 1865—no matter what *form* of acceptance of the act may be prescribed—repealable. Assume that so far as the act of 1865 itself is concerned, the right to repeal the *whole act* is not clear; how does the matter stand under the general act of 1846? What is the answer to that? nothing;—but that the legislature in the act of 1865 required, that before that exemption should be in force, there should be a *written* acceptance of it, and that *that* was given.

Without this requisition of a written acceptance, the supplement could not have been in force unless there was an acceptance; and is the *surrender* of the taxing power which the legislature had, as to corporations, carefully guarded against surrendering, by the act of 1846, to be surrendered, because the legislature required the necessary acceptance to be *written*, and it was written? Is not that *all* that there is in this case different from any charter granted since 1846?

An act expressly requiring a written acceptance where an acceptance was necessary at common law--cannot, since the act of 1846, import an offer to contract, any more than, since that act, the simple grant of the exemption would. The courts have uniformly held that such an act must have the same interpretation as an act without any such requisition; and if more was meant, more could easily have been expressed, and the court ought to suppose would have been.

Morris Canal v. State, 4 Zab. 70.
Del. and L. Canal v. Del. Bay R. R., 1 C. E. Green, 367.

There is no natural connection between a *written* acceptance of an act and a contract, that there is not, between an acceptance *un*written and a contract. Indeed, *written* acceptances of amendments to charters have been required in Connecticut since 1845, for the very opposite purpose; and were, by statute, declared to have the effect of making the original charter and all amendments subject to repeal. (*Statutes of Connecticut, compilation of* 1854, *p.* 206, *sects.* 164, 165; 42 *Conn. R.* 135, 136.)

It is a matter of the highest probability that the only object of requiring an acceptance of the 3d section of the act of 1865, was to fix a definite time when the company should pay taxes, and get the company on record as admitting its obligation to pay when the road should be open and in use, to Phillipsburg. It had been chartered for thirty years, and had never paid its charter tax.

State *v.* Douglass, 5 Vroom, 84.

It had resisted taxation under the general act of 1862, and in November, 1874, been held liable to general taxation (1 Vroom, 368; 2 Vroom, 521, 577, 578). When it came for more power in 1865, it was *required* (so says the subsequent act of 1867,) to pay, by the act of 1865, its charter tax, so soon as it was open and in use to Phillipsburg, instead of paying only when it made 7 per cent. on its cost. It is of great significance that when it

was taxed in 1869 by Jersey City, no mention was made of its having a *contract* of exemption by the act of 1865. State *v.* Haight, 6 Vroom, 42; and the case was decided wholly on the act of 1867.

Again: The act of 1867 (ante p. 7 and 8,) is a cogent argument that no contract was intended by the act of 1865. It recites that the road was now extended to Phillipsburgh—that new powers were necessary, which were given, subject to the old liabilities. The 3d section re-enacts the exemption and recites the exemption of 1865, not as a matter of contract; but directly the contrary: "which" tax

> "by the said charter and the supplement thereto, approved on the 23d day of March, 1865, was *required* to be paid by said company in lieu of all other taxes."

How marked the difference between this and the before-mentioned act of 1854, which expressly acknowledged certain charters as contracts (ante p. 20).

There is nothing new in the third section of the act of 1865 except the postponement of the time at which taxation shall commence. The tax is not new. The exemption is not new. The act of 1865 says the tax imposed by the charter in 1835, payable when 7 per cent. is made, shall be paid when the road is open and in use to Phillipsburgh. The time to pay the original tax had not arrived in 1865, yet the company had been taxed as early as 1862 under the general act of that year on the ground that that general act had repealed the exemption of 1835 (1 Vroom, 369; 2 Vroom, 521, 577, 578, 582).

All that was new in the act of 1865 was the postponement of the time.

It is plain that the legislature was jealous of its power over this company from the day of its incorporation.

What, then, are the circumstances accompanying this legislative act and acceptance of 1865, from which it may be implied that there was an irrepealable contract intended to be made by the state?

The *subject* of the grant is a most important circumstance—a tax exemption. As from the original charter of 1835 no irrepealable contract could be implied, the power to repeal it being reserved in the act itself; so as to the act of 1865, the acts of 1835 and 1836 were yet existing; and there was also existing and speaking to the prosecutor the provision of the general act of 1846, that "every charter hereafter granted shall be subject to alteration, suspension and repeal."

A supplement to the charter is a charter.

Tomlinson *v.* Jessup, 15 Wall, 457.
Humphreys *v.* Peques, 16 Wall, 248.
Iron Bank *v.* Pittsburg, 37 Pa., 349.

What can be stronger to destroy the implication that the act of 1865 and its acceptance create an irrepealable contract than this: that the legislature was then saying to the company in most authentic form, this is to be alterable, suspendable and repealable.

The act of 1865 is to be construed as if the act of 1846 was incorporated into the act of 1865. (Holyoke Co *v.* Lyman, 15 Wall, 522.) If this is so, it is immaterial that the State required an acceptance.

The case of Tomlinson *v.* Jessup, 15 Wall, 454, 457, holds that such an act of the legislature as that of 1846 constitutes a *condition* upon which every charter of a corporation subsequently granted is held, and upon which, also, every modification or amendment is made.

The power reserved by the act of 1846, authorized any change in the exemption or its entire revocation.

(*Tomlinson* v. *Jessup*, 15 *Wall*, 458.)

So the charter of 1835, which reserved a power to repeal, and the supplement of 1836, which repealed that power, and substituted a power to amend and alter —authorized any change in the exemption. (*Ibid.*)

The reservation in the act of 1846 affects the *status* of the corporation in every dealing that it thereafter has with the state (*Ibid*).

The fact that this company did not hold its original exemption by an irrepealable contract, is cogent evidence that the act of 1865 was not intended as a proposition to contract which was to take effect as an irrepealable contract by its acceptance, irrespective of the law of 1846. Indeed, this ought to be decisive since the act of 1846. It is *the* circumstance which will save to corporations who *have* contracts, the character of contracts, to all their dealings with the state since 1846. Corporations which have contracts stand on a very different footing from corporations who have not contracts—in any deal with the state since the act of 1846. Suppose there to be an undoubted contract of exemption from taxation, except to a certain amount, older than 1846, and that after 1846 the legislature propose to reduce the exemption. The corporation can resist it—the legislature cannot force it. If, in such circumstances, the legislature recognize the existence of the contract, and propose to alter it and submit the alteration to the acceptance of such a corporation —this, all would say, *is a proposition* to contract.

When a contract takes the *form* of a law and not of a contract—as is always the case where an act of the legislature is in question—the contract, if any, is necessarily implied.

This implication is intended to be removed by the act of 1846. It satisfactorily removes it if, at the time of any charter or supplement, the corporation *begins* its dealings with the state, or if it already has no contract.

But if the corporation, at the time of a supplement, already has a contract of exemption from taxation, the state is so bound, it is so utterly powerless to dictate a reduction of it, that it is impossible to view a supplement reducing the exemption in any other light than a usurpation of power or an offer to contract.

Under such *circumstances*, a provision for acceptance becomes a proposition for a contract. It is utterly void as anything else. It must have *some* meaning; and though the act of 1846 declares future charters repealable, such a supplement cannot possibly be within the word "charter." It is a reduction, a clipping off of franchises or immunities by the grant of the company, not a grant of them by the state; and to make the act of 1846 apply to such a supplement, some other words than those contained in the act of 1846 itself are necessary. The words of that act do not, as they stand, extend to such a case. By the case, as stated, the state grants nothing; but the company grants to the state. A reservation of a power to the state to resume *its* grant has no application whatever to the company's grant. In the sense of the act of 1846 the company's release of part of its exemption is no charter to be resumed by the state.

Hence the supplement of 1869, relating to the Camden and Amboy Company, is no more repealable by the state than the original charter was originally repealable by the company. Hence also the supplement of the Morris and Essex Co. of 1865, being truly, in its nature, a charter within the act of 1846, *is* repealable.

Hence, also, the act relative to the N. J. R.R. of April 18, 1846 (P. L., 1849, Appendix, pp. 66 and 67,) would, although it did not provide that it may be repealable, be subject to the general act of February 14, 1846, although the company had a contract; and the reason is that this act was no relinquishment by the company, but a grant for three years, by the state, of an exemption double the old contract exemption.

Circumstances always were the foundation of the contract (ante Point II).

Requiring and receiving a formal acceptance of a municipal charter does not import a contract. To be sure the deal is with the public whom the legislature may control. But since the act of 1846 the deal with a private corporation without a contract, is equally with a body whom the legislature can control, and for that reason the requisition of an acceptance shows no intention to contract. But if the corporation already has a contract, it is a circumstance of the greatest importance.

Where the company has no contract and the act of 1846 is in existence, there is no consideration for a contract, on the part of the state, arising from the company's mere undertaking to execute the powers given.

Tomlinson *v.* Jessup, 15 Wall, 458, 459.

If the act of 1846 is swept out of the way, such consideration, on the company's part, might appear to exist, but here it was not swept away.

Nor can it be swept away except by language distinctly manifesting that intention, and referring specially to *that* statute.

Lord Darcie's case, Croke Eliz., 512.
Cooley on Constl. Limitations, 281, *note* 3.
See, also, West Wisconsin *v.* Supervisors, 3 Otto, 596.
Tucker *v.* Ferguson, 22 Wall, 575.

Where a constitution inhibited exemptions from taxation; but an ordinance declared to have equal effect, permitted the legislature to provide by law in what manner a railroad which the state had bought, should be sold, it was held that as the constitution prohibited exemptions, it could never have been the intention of the ordinance

passed by the same convention which made the constitution, to authorize an exemption by the words of the ordinance authorizing the sale.

Trask *v.* Maguire, 18 Wall, 393, 409.

Wherever there is an express right to repeal a charter reserved, and a right of taxation also untrammelled by an irrepealable contract, he who claims an exemption from taxation and an irrepealable contract securing it perpetually, must show a double surrender; one of the sovereign power of taxation, which must be in clear, explicit, and unequivocal terms, and the other of the expressly reserved power to alter, suspend and repeal.

North Missouri *v.* Maguire, 20 Wall, 61.

Why should not the surrender of this expressly reserved power also be in clear, explicit, and unequivocal terms? There is a presumption that if the legislature intends to divest itself of any right, it will do so in express terms.

U. S. *v.* Herron, 20 Wall, 263.

It would have been easy to have so declared. Not having so declared, we cannot presume that such was the intent.

Tomlinson *v.* Branch, 15 Wall, 465.
Morris Canal *v.* State, 4 Zab., 70.

It was easier to express the intention than to avoid expressing it.

Oleson *v.* Green Bay Co., 36 Wisconsin, 389.

The surrender of the reserved power was made in express terms in the case of Home of Friendless *v.* Rouse, 8 Wall, 438.

There the act making charter repealable was in the exact terms of the New Jersey general act of 1846, but the legislature declared that the act making charters repealable "shall not apply to this corporation" (p. 431,

432). So, also, in Tomlinson *v.* Branch, 15 Wall, 469. Lord Darcie's case, Cro. Eliz., 512.

This is really the only way in which the legislative intent can be made satisfactorily clear, in any case where the legislature were entirely *unbound*, before the alleged irrepealable contract.

But to protect supplements since 1846, which are *releases by the company of exemptions*, the act of 1846 need not be swept out of the way. It does not apply. Such a release is not a charter *to* the company; it is a charter *by* the company; and to construe the release to be so enlarged by the act of 1846 as to enable the state to go on enacting greater releases by the company from time to time, is to construe a rule which provides that state grants shall be resumable, to mean that grants to the state are enlargeable from time to time to any extent that the state thinks proper.

The presumption that the company, which has a contract, does not intend to release it, unless it does so clearly, is just as strong as the presumption that the State does not intend to surrender its taxing power or power of repeal, unless it clearly does so.

To say that requiring an acceptance is conclusive that the legislature intended to be bound irrevocably, though the legislature were entirely *unbound at the time*, is to say that all private charters are contracts, notwithstanding a general act declares they shall not be, for an acceptance is in all cases required.

In all these cases the form is nothing. The contract is not express *ever* (ante). It depends not on *any* form. One part of it was an enactment by record of the sovereign; the corresponding part of the other side has not been even in writing—an implied acceptance was always enough.

But even aside from the act of 1846, the strict construction doctrine is more rigidly applied in all these cases. To doubt, in these cases, is to be resolved. Ancient corporations were allowed to prescribe for their powers. Modern corporations are not.

Att'y Gen'l *v.* Lupton Board, 2 Jurist, N. S., 180.

Ancient charters granting franchises, even those since time of legal memory, ought to be construed *as the law was taken* when the charter was made; 2 Inst., 282.

The converse ought to hold true, and modern charters ought to be construed as the law is taken when they are made. The policy of the state since 1846 has become entirely different.

Can any one read the original charter of the company (ante p.); supplement of 1836 (ante p.); and the act of 1846 (ante p.); and the supplement to the company's charter of 1865, and its acceptance (ante p.); without feeling that there is the very greatest doubt of any intention on the part of the legislature to make an irrepealable contract with the company?

The considerations suggested in the next point will be persuasive reasons for requiring more evidence of a contract during the existence of the act of 1846, than a mere *requisition* of a written acceptance, and the giving of an acceptance in writing.

Again, The act of 1869 shows that the franchises of the prosecutor have been assigned; the lease is perpetual.

It does not appear that the immunity from taxation was assigned; and only immunities *assigned* are by the act of 1869 to be enjoyed by the assignee.

If it is assigned it is extinguished, as it no longer belongs to the corporation to which it was given.

Morgan *v.* Louisiana, 3 Otto, 222.

This is so unless it was regiven by the act of 1869. But all that was given by that act is what was assigned and it does not appear that the immunity was assigned.

If it *was* regiven by the act of 1869 it was not regiven by an irrepealable contract.

POINT III.

The act of 1867 creates no irrepealable contract.

The circumstances connected with the act of 1867 show that the words "any act to the contrary, notwithstanding" are referable to a tax act of 1836, relating to *Jersey City*.

The **circumstances** are what make an act an implied contract. Ante Point II.

In 1862 the company was assessed in Morris County under the general tax law of that year. This assessment was removed to the Supreme Court, and decided in State v. Miller, 1 Vroom, 368, A. D. 1863, to be good; because the company though its charter of 1835 gave it an exemption, had no irrepealable contract; and the general law of 1862 had repealed the exemption of 1835, contained in original charter. This was affirmed on appeal in 2 Vroom, 521; the reasons for which are given in 2 Vroom, 577, 578.

In 1865, after the exemption of that year, the company was assessed in Hoboken, under the general tax law of 1862; and the assessment held invalid; because the

exemption of 1865 repealed the general tax law of 1862, as to this company. This was so held in State v. McGavisk, 5 Vroom, 510.

In 1866 the general tax law of that year was passed; which—while it was otherwise as full as the act of 1862—contained in the last section a repeal of all acts, special, local or otherwise, except such special or local acts as shall have been approved since 1862; and so up to this point in the act of 1866, the special act of 1865 was not repealed. But the last section also provided that

> "The supplement to the charter of Jersey City, of March 29, 1866, and the acts and parts of acts thereby reinstated, shall *not be affected* by this act."

This left the company in 1866, so far as Jersey City is concerned, to the operation of the provision in the Jersey City supplement of March 29, 1866. (*P. L. p.* 880, *sec.* 2.)

> "that *no* real or personal estate owned in said city *shall be exempt* from taxation."

Besides this the Jersey City supplement of March 29, 1866, revived a provision of one of the supplements to the Jersey City charter, "that no act shall be deemed to repeal or modify the tenth section of the supplement to the Jersey City charter of March 18, 1863, unless expressed to apply to said city by name."

> See Act of 1863, P. L. 318; Act of 1864, P. L. p. 350; Act of March, 29, 1866, P. L. 879, 880.

This proviso in the general tax act of 1866, declaring that the Jersey City act of 1866 should not be affected by the general tax act of 1866; and this Jersey City act of 1866, enacting "that *no* real or personal estate owned in said city should be exempt from taxation," made the supplement to the company's charter of 1867 desirable.

The company's supplement of 1867 accordingly declared that no tax, &c., shall be imposed on "any property, purchased, held or used by said company for the purposes of their charter or supplements, except the tax which, by the charter and supplement of 1865, *was required* to be paid by said company in lieu of all other taxes *any act to the contrary notwithstanding.*"

The company now pretends that the "act to the contrary" referred to, is the general act of 1846, as to the repeal of charters, whereas it manifestly refers to the Jersey City act of March 29, 1866, which was not to be affected by the general tax act of 1866. If the Jersey City act of 1866 was not to be affected by the general tax act of 1866, which excepted exemptions since 1862, and so thereby saved the act of 1865 from the operation of the general tax act of 1866; it left the company subject to the Jersey City act of 1866, "that no real or personal estate owned in said city shall be exempt from taxation."

The company's act of 1867 therefore provided that "no tax shall be imposed upon any property," &c., of the company except the tax of 1865, "any act to the contrary," &c. This language is so different from that of the charter and the act of 1865, that it points directly to the Jersey City act of 1866.

Accordingly when *Jersey City* assessed in 1869, under the Jersey City act of 1866, the company's property which had been acquired in 1869, the company set up the company's act of 1867, not as a contract, but as a direction to the assessor; and it was held that the act of 1867 exempted the company. This was decided in State *v.* Haight, receiver of Jersey City taxes, 6 Vroom 40.

It is a *very material circumstance* against construing the act of 1867 as a contract, and in favor of limiting the force of the words "any act to the contrary notwithstanding;" that the act of 1867, on its face declares that it is

merely the renewal of an *old* exemption; that the tax, which is to be in lieu of all others, is that prescribed by the act of 1865. This circumstance shows that there must have been some act *since* the act of 1865, and not before it, which was to be displaced by the words "any act to the contrary," &c. The act after 1865 and before 1867 was the Jersey City act of 1866. The rule which in other states holds that the exemption from tax extends only to the franchise and does not exempt the property was rejected in New Jersey 40 years ago. State *v.* Berry, 2 Harr, 80, and this rejection has repeatedly been re-affirmed, 4 Zab. 402.

Therefore the act of 1867 could not have been intended to exempt property as distinguished from the franchises.

The interpretation-statute of 1846 controls the construction of such terms, in the act of 1867, as the act of 1846 declares the **interpretation** of.

Other words than those controlled by the act of 1846 may restore the ancient interpretation; but the words interpreted by the act of 1846 must, until other words are shown to restore the old interpretation, receive the interpretation established by the act of 1846.

Unless this is so, an interpretation-statute would be nugatory. Whatever the terms of the subsequent statute of 1867, if their interpretation in future statutes has been fixed by a prior statute—the act of 1867 must be construed as if the terms it uses were translated by the interpreting words of the prior act. Being so interpreted, the words relied on to create an irrepealable contract—" no tax shall be imposed except the tax of 1865 "—cannot do so; bscause the interpreting statute of 1846 declares they shall not. A statute must undoubtedly be interpreted by

the rules of interpretation existing at the time of its passage.

State *v.* Person, 32 New Jersey (3 Vroom), 134.
Walker *v.* Whitehead, 16 Wall, 317.

The **interpretation-statute** is not **inconsistent** with those words in the statute of 1867, which the statute of 1846 controls.

The words which the act of 1846 controls, are at least those which declare that "no tax except that of 1865 shall be imposed."

These words are the only words from which an implied contract could ever have been inferred. The words "any act to the contrary notwithstanding," if there were no act of 1846, would not add any strength to the inference of an implied contract; so that it is unimportant whether they are controlled by the act of 1846 or not.

If the words, from which a contract might have been inferred, are interpreted *according* to the old statute, the act as it stands construed—cannot be inconsistent with the interpreting act, nor the interpreting act inconsistent with it. A rule of interpretation cannot be inconsistent with anything else but a rule of interpretation. Therefore, the words interpreted cannot, after interpretation is given in *accordance* with the act of 1846, be inconsistent with that act.

State *v.* Person, 32 New Jersey (3 Vroom), 134.
Walker *v.* Whitehead, 16 Wall, 317.

The **interpretation-statute** of 1846 is not *contrary* to the act of 1867, though it says "no tax shall be imposed, any *act* to the *contrary* notwithstanding."

An interpretation-statute—*applicable* by its terms to all future statutes—ought not to be repealed as to a particular future statute, by any less words than such as declare the intent, that the interpretation-statute shall not apply to the particular statute.

"In *modern* statutes" (says Judge Buller) "great care is taken to mention the *particular case* in the contemplation of the legislature; and, therefore, the courts are not permitted to take the same liberty in construing them as they did in expounding an ancient statute."

Bradley v. Clerk, 5 *T. R.*, 201, 202.

Statutes which are established with reference to a public policy ought not, by any constrained construction, out of the general and ambiguous words of a subsequent act, to be abrogated, but maintained and supported with a benign and favorable construction.

Dr. Foster's case, 11 Rep. 63.

Some notice ought to be taken of the former act, so as to indicate an intention to repeal it.

Dwarris, 674.

General words of a later statute shall not repeal the special provisions of an earlier statute.

Dwarris, 658, 659.

In Lord Darcy's case, Cro. Eliz. 512, there was a crown grant by Edward IV. to St. Paul's, of a franchise in the manor of North Kirby, to be discharged of purveyance *non obstante aliquo statuto*, which had been surrendered; and then Edward VI. re-granted to Lord Darcy all the liberties, privileges and franchises that St. Paul had held also *non obstante aliquo statuto*. A *quo warranto* issued to know by what warrant it was claimed; and the grant was set up; to which the replication was a statute of 27 H. 8, Cap. 24, which enacted that all places should be subject to the king's purveyors. To this there was a demurrer.

It was argued that "the express clause *non obstante aliquo statuto*" dispensed with the statute, *Gawdy and Popham*, J. J., held that an express *non obstante*, of *that* statute, so that it might appear that the king *intended* to grant them, notwithstanding *that* statute, was necessary.

This case is approved by Bridgman, Ch. J., in Lyn vs. Wyn, Reports of Judgments of Lord Bridgman, 127.

The only cases reported in which any such intent was manifest, were cases wherein the intention was clearly expressed by enacting that the interpreting statute should not *apply* to the new statute.

Home of the Friendless *v.* Rouse, 8 Wall, 430.

Pratt *v.* Atlantic and St. Lawrence, 42 Maine, 587, 588. Laws of Maine, A. D. 1831.

Tomlinson *v.* Branch, 15 Wall, 469.

The act in question here, is simply a grant of the *old* exemption of 1865, "any act to the contrary, notwithstanding," words plainly referable to the Jersey City tax act of March 22, 1866, which enacted that no real or personal property should be exempt from taxation. These words repealed the exemption of 1865, as to Jersey City, and the Jersey City act of 1866 was in its turn repealed by the act of 1867.

Nothing can make the new statute "contrary" to the old interpretation statute, except a repeal of the rule of interpretation; or a district exemption of the particular statute from it; for the words of the new statute until then, will mean what the previous interpretation statute declares they shall mean.

This subject is clearly and copiously illustrated by Judge Elmer, in the case of State v. Person, 3 Vroom, 134; affirmed on error, in 3d Vroom, 566.

If a statute enacts that certain conduct shall create a liability, "any act to the contrary, notwithstanding," it would not take effect immediately. The interpretation act which declares that "laws shall take effect July 4, unless otherwise specially provided for in such act" would prevent it. Nor would the words "any act to the contrary" in such a statute repeal the general statute declaring the force of all statutes.

Nor would an act declaring that a month's or a year's notice should be given "any act to the contrary, notwithstanding," repeal the act which declares that in all statutes the word "month" shall mean a calendar month, and a "year" a calendar year. By statute "oath" means an affirmation; sworn is to include "affirmed;" "state" when applied to different parts of the United States is to include the territories and the District of Columbia. Such old statutes are not repealed by the very words whose meaning is defined by them.

These words in a new statute mean what the old statute says they shall mean, and the use of them does not import a repeal of the interpreting statute.

An act which declares the force of every future grant of an exemption from taxation, whatever the words of it, is not "*contrary*" to any such future grant, whatever its terms, but only *applicable* to it.

It is just such acts as that of 1867, which were intended to be controlled by the act of 1846, and unless there is something in the act of 1867 removing the act of 1846 out of the way of the act of 1867, the act of 1846 must control its construction.

To enact that no tax shall be imposed on the company, except an old tax before created, "any act to the contrary notwithstanding," is not to put out of the way, as to this company only, an act which regulates the construction of

all such grants; but to let it stand as a rule of interpretation and remove only acts which are contrary to it, when interpreted according to the rules of interpretation existing at the time of the grant.

Things cannot be "contrary" to each other, unless they are in their nature capable of opposition. Things which are merely different are not contrary. To be contrary they must be so nearly allied and connected that they will come under the same classification. Length and breadth are both extension, and so may be opposite; and being opposite are therefore contrary. But a yard, though extension, yet when viewed as a mere *measure* of extension, is not and cannot be contrary to extension in any direction. It may be contrary, perhaps, to another measure—a foot. So an act may be contrary to an act. But can an act, which is a mere measure or rule for measuring or interpreting a grant, be either contrary to the grant or to the act which makes the grant?

The manner of reference to the act repealed, is very strong to show that it could not have been an interpretation-act. The repealed act is repealed by a description of it, which requires a comparison of provisions with the new act—and if on comparison, the provisions are contrary to the new act, the old act is repealed. The form of repeal is such that it makes the repeal dependent on the *contrariety* of the provisions of the act repealed to the then act. This contrariety is the sole description; and before an interpretation-act is repealed by such words, the contrariety should very clearly appear.

The act of 1867 is a grant; the act said to be repealed, is an act for the construction of grants. It would not seem to be natural to predicate of a rule for the construction of all grants—that it is contrary to any grant. Indeed the rule is a part of the grant, and makes it what it is.

The words of previous interpreting-statutes are just as much incorporated in a subsequent statute, as the words of the subsequent statute themselves. Every rule of interpretation is so incorporated. Another act, or provision of an act, which makes a different rule of interpretation, may be contrary to the older interpretation act. But how can an interpretation-statute be "contrary" in its provisions to any subsequent statute, except a statute which itself is an interpreting-statute or an act repealing an interpretation-statute? An act saying an interpreting-statute shall not apply, is an interpreting-statute; for it restores an older interpretation.

The principal case in courts below is reported in 8 Vroom, 228, and 9 Vroom, 472.

R. GILCHRIST.

Supreme Court of the United States.

OCTOBER, 1877.

YARD, N. J. TAX COMMISSIONER.

—ads.—

STATE,

(MORRIS AND ESSEX R.R.)

Additional Brief for Defendant in Error.

The questions in the case are (1) whether the Morris and Essex R. R. Co. has a *contract*; which (2) has been impaired by the general tax act of N. J. of 1873.

I wish to excuse myself for not discussing orally the *construction* of the general tax act of 1873.

I think that part of my argument already filed, which goes to show that the act of 1873 directed that this company should, without its consent, pay the tax mentioned in the act of 1873; is not necessary for me to maintain.

On the contrary, that it is for the *plaintiff in error* to maintain; and unless this proposition is established by the plaintiff in error, the writ of error fails, just as any *action at law* fails if the necessary allegations to maintain it are not made out by the plaintff;—and the defendant in error must have judgment rendered for *him*, as a defendant in an action at law must have judgment for *him*, if the plaintiff abandons a necessary allegation or does not make it out.

The relief sought by this writ of error is a reversal of the judgment below.

Two propositions are necessary to be alleged by the plaintiff in error, in this Court, to justify this Court in giving any attention to the writ of error.

The first, is that there is a *contract* that this company shall pay only the tax of 1865.

The *second* is that the act of 1873 directs that *this company* shall, without its consent, pay a different tax from that of 1865; for thus only, can it be shown that the alleged contract of 1865 is impaired by the act of 1873.

These allegations are on the record;—necessarily there.

They are on the record in this form:

1st. That the act of 1865 is a contract, to the effect that the State will not impose any tax but that of 1865 on this company.

2d. That the act of 1873 impairs that contract.

It is obvious that the act of 1873 cannot impair the alleged contract of 1865, unless it directs that the company shall pay a different tax from that of 1865. The allegation that the act of 1873 impairs the alleged contract of 1865, is in effect and substance, that the act of 1873 *directs that this company, without its consent, shall pay a different tax from that of* 1865.

These two propositions are to be considered in their natural order.

Contract or no contract is the *first* question.

The other question—whether the act of 1873 impairs the alleged contract of 1865 cannot be resolved at all

without first resolving the question whether there is a contract.

The question whether the act of 1873 impairs a contract, is therefore the *second* question.

If this Court shall find there is no contract, at all, *further investigation* is useless; for if the alleged contract of 1865 does not exist, the act of 1873 *cannot* impair that contract. If there is no contract, the only thing the Court can do is to affirm the judgment; for the judgment cannot be reversed as enforcing a law which impairs a contract, if there is no contract to impair.

The consideration of the act of 1873 can never be reached if the Court conclude there is no contract. But the plaintiff in error having failed at the first step, as he would be non-suited in an action, so judgment will be given for the defendant on the writ of error.

Indeed, though the Court should find the act of 1865 *is* a contract, the judgment below cannot be reversed, unless the Court proceed further and find to be true the other allegation of the plaintiff in error, which is on the record, that the law of 1873 impairs the contract. The Court cannot find that the law of 1873 impairs the contract, unless it finds that the law of 1873 directs that the company shall pay some tax; and that a tax different from that of 1865.

The law of 1873 comes up in its natural order after the Court has settled the question of contract or no. *That* it settles entirely regardless of State laws, and on its own views of construction.

But when this Court has before it a judgment which is alleged to be erroneous, because the law it enforces impairs a contract, this Court never considers what the *true* construction of the law is on which the judgment is pre-

tended to be founded, or whether by its *true construction* the law does or does not impair the contract; but what is the *true construction of the record* removed—the judgment, and whether the law put in force by the *judgment* impairs the contract. The law put in force by the judgment is what the Court below *construes* the law to be. The *construction* of the Court below—the law it puts in force—is not to be found in what it says in its opinion; it is to be found in the terms and in the force and effect of its judgment as displayed in the record.

A State Court may hold that there is a contract—that only a certain tax shall be paid—and, in its opinion, say that the law impeached does *not* direct that a different tax shall be paid, and so does not impair the contract.

In that case, and in all tax cases where a law is impeached as impairing a contract, a plaintiff in error *must* allege, 1*st*, that there is a contract; and, 2*nd*, that the law impeached, directs that a different tax shall be paid; and may prove the allegations. There may be a difference of opinion as to what constitutes a difference between taxes; and if this Court find this second allegation to be true, and that the State Court's opinion that a different tax was *not* directed to be paid, is erroneous, and that their recorded judgment allows a different tax to be *recovered*, it may reverse.

This Court does not regard what the Court below *says* is the force and meaning of the law; but what *force* and meaning, in the opinion of this Court, the Court below gives to the law *by the record of the judgment.*

If the judgment of the Court below, as displayed in the *record*, in the opinion of this Court, gives to the law the *force* of impairing a contract—this Court will reverse such judgment as founded on a law which impairs a contract, though there is no statute or law in the case.

In such case both the allegation, that a contract exists, and the allegation, that a different tax from the contract tax is directed to be paid is found to be true, and so the writ of error (the plaintiff's action) is maintained; and consequently he prevails; and the judgment below is to be reversed.

So the State Court may hold that there is no contract; and that the law impeached imposes the same tax as the alleged contract-tax, or no tax at all. In this case, too, the same two allegations may and *must* be made by a plaintiff in error: 1st, that there was a contract, and 2d, that the law impeached imposes a tax, and a different tax; and so impairs the contract. In such case, if this Court finds there is a contract, it finds the first proposition to be true. If it finds that the judgment of the Court (no matter what the opinion says) gives such *force* to the law impeached as makes it impair a contract, it will reverse the judgment.

But the State Court may hold, as it has in this case, that there is no contract, and that the law impeached *does* direct that a tax, and a different tax from the alleged contract-tax, shall be paid.

The plaintiff in error in such case also *must* allege, *First*, that there *is* a contract, and *Second*, that the law impeached directs that a tax and a different tax from the contract-tax shall be paid; and this Court must, to reverse this judgment, find both allegations to be true.

The defendant in error may sustain the judgment below by showing that the Court below was right in holding that there was no contract. But he cannot sustain it, if this Court holds there is a contract, by showing that the act of 1873, according to its *true* construction (which is opposite to the construction of the Court below) *does not impair* the contract.

The answer to such a proposition is, that though this Court may agree that the law of 1873, properly construed, imposes no tax; yet the law of 1873 has (in the recorded judgment of the Court below) the *force* of imposing a tax; that the constitutional provision means that no State shall pass any law which shall *have the force* of impairing a contract. It is immaterial what force the law *ought* to have. The question is what force it *has* in the judgment before the Court. The law itself is not the record brought before the Court, as in case of a certiorari removing a by-law of a corporation; there the Court deals with the by-law itself, the Court vacates the by-law. Here it cannot deal with the law itself; it must deal with what is before it; it must vacate the judgment or vacate nothing. The Court cannot execute the provision of the Constitution unless it treats the law alleged to impair the contract as having the force and meaning actually given to it by the *judgment* below.

Whatever meaning and force the *judgment* gives to the law, that is the force and meaning of the law which the Constitution intended to provide against; that is the meaning and construction which this Court must deal with; that is the meaning which *in the judgment*—the only thing before the Court—the law of 1873 has. It is this force and meaning that this Court must give to the law of 1873, and if that meaning and force, as expressed in the judgment, will impair the contract, this Court will reverse, whatever may be its own opinion as to the *true construction* of the law.

Neither party can gain its end, the one to reverse or the other to affirm the judgment below by merely showing that the Court below made a wrong decision as to the meaning of the act impeached.

The plaintiff cannot reverse the judgment below, though the Court below was wrong in saying that the law of 1873 subjected the company to a tax. That may be true and yet the law of 1873 not be an act impairing

a contract; and unless it is such a law, this Court, no matter how erroneous the judgment is in holding that the law of 1873 imposed a tax on the company, is not entrusted with the power of reversing the judgment founded on such a mistake. The mistake must go farther:—the mistake must consist of rendering a judgment which gives to a law the force of impairing a contract. The judgment may be exceedingly erroneous, the law of 1873 be egregiously misconstrued, and yet it not be in the power of the Court to correct the error. The more clearly it appears to this Court that by the true construction of the law of 1873 it did not tax the company at all, the more clearly it is established that the law of 1873 cannot impair the contract.

Nor can the defendant in error prevent a reversal by establishing that the Court below was wrong in its construction of the law of 1873 and that by the true construction of that law it did not impose any tax at all; for if the judgment gives to the law of 1873 the force of imposing a tax different from that of the contract; the law of 1873, whatever its true construction, has *in the judgment*, the force of imposing a tax different from the contract and is therefore within the constitution a law impairing a contract.

Whether this Court holds that there is or that there is not a contract, it is immaterial what the *true* construction of the law of 1873 is.

If there is a contract it is immaterial that by the *true* construction of the law of 1873 no tax is imposed on the plaintiff in error, as long as the judgment *in accordance* with that law, or by a misconstruction of it, is rendered for a tax contrary to such contract.

It is immaterial whether the Court below has a law to justify it, or no law to justify it; if the judgment is rendered for a tax contrary to a contract the judgment enforces a law impairing a contract, and the Court will reverse it.

It is immaterial that the law enforced by the judgment was passed or not passed—that the Court below acted on a law which never existed, or on a law that was passed and misconstrued—on a law that *did* justify it however construed, or did not justify it however construed. If the judgment enforces a law which impairs a contract, if the judgment is rendered for a tax contrary to a contract, this Court *assumes* that is rendered according to some law which impairs a contract, and therefore the Court reverses it.

If there is not a contract it is immaterial that by the true construction of the law of 1873 no tax was imposed; because the absence of the contract prevents the case presented to the Court being a case in which any law, construed truly or falsely, can impair a *contract*; for, by the present hypothesis there is no contract to impair.

If it be the true construction of the law of 1873 that no tax was imposed by it, the judgment may be erroneous; but this Court cannot reverse erroneous judgments unless some contract is impaired, and by the present hypothesis there is no contract to impair.

While I am willing to admit that the law of 1873 imposes a tax, and a tax different from that of 1865, and that, *if there is a contract*, that the law of 1873 impairs it, I am unwilling to discuss a question which appears to me entirely immaterial, or admit that by the *true* construction of the law of 1873 no tax is imposed; but if I did admit it, this Court could not *reverse* the judgment below.

On this admission the Court cannot reverse *if there is no contract*, because it does not show that any *contract* is impaired.

If *there is a contract*, the Court cannot reverse on this admission, because the admission does not show that the judgment below is rendered for a tax contrary to *the contract*, though it is contrary to the law of 1873.

This Court cannot reverse unless the judgment is for a tax contrary to some contract. To prove that the judgment is rendered for a tax contrary to the law of 1873, does not prove that it is contrary to the contract. If there is a contract it is immaterial what the construction of the law of 1873 is. The things to be compared are the contract and the recovery in the judgment. If the judgment is for a tax contrary to the contract, that is enough; but no less is enough. No more is necessary. The construction of the act of 1873 is therefore immaterial. It may be contrary to the contract *and* the law of 1873, but the latter is of no consequence in this Court.

R. GILCHRIST.

Supreme Court of the United States.

STATE,
(MORRIS AND ESSEX R.R., *Prosecutor*,)
—*v.*—
YARD, N. J. TAX COMMISSIONER.

SOME CHARTERS AND GENERAL ACTS RELATING TO RAILROAD TAXATION IN NEW JERSEY FROM 1830 TO 1873.

1830.

An act to incorporate the Camden and Amboy Railroad and Transportation Company, passed February 4, 1830, Sec. 23, p. 26, of Appendix to Laws of 1849.

SEC. 23D.

And be it enacted, That, from and after the completion of the said road or roads, it shall be the duty of the Treasurer of the said Company, under oath or affirmation, to make quarterly returns of the number of passengers, and the number of tons of goods, wares and merchandise transported on the said road or roads, to the Treasurer of this State for the time being, and thereupon to pay the said Treasurer of this State, at the rate of ten cents for each and every passenger, and the sum of fifteen cents for each and every ton of merchandise so transported thereon; *and that no other tax or impost shall be levied or assessed upon the said company.*

1831.

An act relating to the Camden and Amboy Railroad and Transportation Company, passed February 4, 1831; P. L., 1849, appendix, p. 28.

Section 1 makes it lawful for company to transfer 1,000 shares of stock to State.

Sec. 2—State to have one director.

Sec. 3—Transit duty limited to passengers crossing the State between the Delaware river and Raritan Bay.

Section 4—Directs how appraisement of the road shall be made.

SEC. 5.

And be it enacted, That, upon filing the assent of the company to this act in the office of the Secretary of the State, this act shall be deemed and taken as part of the charter of said company; which assent shall be filed within five days after the passage of this act, or this act, and all the provisions therein contained shall be void.

The assent of the company to this act was filed Feb. 8, 1831.

1831.

An act relating to the Delaware and Raritan Canal, and the Camden and Amboy Railroad and Transportation Companies, passed Feb. 15, 1831. P. L., 1849, Appendix, p. 30 and 31.

The companies were authorized to build the railroad and canal out of their joint funds, with the consent of seven-eighths of the stockholders.

Act not to take effect till consent of seven-eighths filed; fares limited, &c.

Acceptance filed May 18, 1831.

1832.

A supplement to last act passed March 2, 1832. P. L., 1849; Appendix, pp. 32 to 34,

Authorizes companies to transfer 1,000 shares of the joint stock to the State, and if dividend and the transit duty do not amount to $30,000 in one year after road transports passengers, it is made duty of company to pay deficiency to the State. Assent of majority of stockholders required.

Acceptance filed April 5, 1832.

1832.

An act to incorporate the New Jersey Railroad and Transportation Company, passed March 7, 1832. P. L., 1849; Appendix, p. 51.

Authorizes railroad from Jersey City to New Brunswick.

SEC. 18.

And be it enacted, That from and after the completion of the said railroad, and after the expiration of five years, the said corporation shall pay into the treasury of this State, yearly and every year, a tax of one quarter of one per cent. upon the capital stock paid in; and after the expiration of ten years, a tax of one-half of one per cent. upon the true amount of the capital stock of said com-

pany, and that no other or further tax or imposition shall be levied or imposed upon the said company; provided, nevertheless, that in addition to the above, if at any time hereafter, any railroad shall intersect or be attached to the railroad hereby established, so as to make a continued line of railroads, carrying passengers across the State of New Jersey, between the States of New York and Pennsylvania respectively, then it shall be the duty of the treasurer of the company hereby chartered, under oath or affirmation, to make quarterly returns of the number of passengers, and the number of tons of goods, wares and merchandise transported over the whole line of the road hereby chartered, to the treasurer of this State, for the time being, and thereupon to pay the said treasurer of this State at the rate of eight cents for each and every passenger, and the sum of twelve cents for each and every ton of goods, wares and merchandise so transported thereon in a manner aforesaid.

1835.

An act to incorporate the Morris and Essex R. R. Co., passed January 29, 1835. P. L. of that year, p. 25.

SEC. 15.

And be it enacted, That as soon as the railroad, with its appendages, shall be finished, so as to be used, the president and treasurer of said company shall file, under oath and affirmation, a statement of the amount of the costs of said road, including all expenses, in the office of the Secretary of State; and annually thereafter, the president and treasurer of the said company shall, under oath or affirmation, make a statement to the Legislature of this State, of the proceeds of said road; and as soon as the net proceeds of said railroad shall amount to seven per centum upon its cost, the said corporation shall pay to the Treasurer of this State a tax of one-half of one

per centum on the cost of said road, to be paid annually thereafter, on the first Monday of January of each year; provided, that no other tax or impost shall be levied or assessed upon the said company.

SEC. 20.

And be it enacted, That no part of the funds of the company shall be used for banking or other purposes not plainly indicated by the provisions of this act; and that the Legislature reserve to themselves the right to alter, amend or repeal this act whenever they think proper.

1836.

A supplement to Morris and Essex charter, passed March 2, 1836. P. L. of that year, p. 223.

SEC. 6.

And be it enacted, That the twentieth section of an act to incorporate the "Morris and Essex Railroad Company," passed the twenty-ninth day of January, eighteen hundred and thirty-five, be and the same is hereby repealed.

SEC. 7.

And be it enacted, That no part of the funds authorized to be raised by this supplement, or of the funds raised, or to be raised, by the charter to which this is a supplement, shall be used for banking or other purposes not plainly indicated by this supplement, or by the act to which this is a supplement, and that the Legislature reserve to themselves the right to alter or amend this supplement, or the act to which this is a supplement, whenever the public good may require it.

1837.

A further supplement to this act, entitled an act relative to the Delaware and Raritan Canal, and the Camden and Amboy Railroad Transportation Companies, passed March 15, 1837. P. L., 1849, Appendix, p. 38.

Authorizes a road from New Brunswick to Trenton, and applies the transit duty to the new road, and other provisions.

Sec. 6 requires an acceptance.

The acceptance is set out at large at page 41. This is the first acceptance which is printed in full in the laws.

A supplement to the New Jersey R.R. charter, passed Nov. 11, 1837, P. L., 1849, Appendix, p. 63, increases capital stock.

Acceptance is provided for, and acceptance in full is printed at pages 64 and 65.

1842.

Joint resolution as to Transit Duties of Delaware and Raritan Canal, and Camden and Amboy R.R., passed March 10, 1842. P. L. of 1849, Appendix, p. 45—

Provides for acceptance by companies.

Certificate of acceptance printed in full, p. 46, 47.

1846.

An act concerning corporations, approved February 14, 1846, which takes effect immediately. P. L., 1846; p. 16; Nixon's Digest, 167.

The charter of every corporation which shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature.

An act relative to the tax and transit duty payable to the State by the N. J. R. R. Co., approved April 18, 1846. P. L., 1849; Appendix, pp. 66 and 67.

This was a temporary act, and made the tax one-fourth instead of one-half of one per cent. until 1849; afterwards at the old rate. By its terms, the act was repealable; but it required the acceptance of the company, and it was accepted (pp. 67 and 68).

Morris and Essex supplement, approved February 25, 1846. P. L. of 1846; p. 57.

Power to build a lateral road; the Company was invested with the powers of charter and supplements, and "subjected to the several restrictions contained in said acts." The third section provided "that the Legislature may alter or amend this act whenever the public good requires it."

Morris and Essex supplement, approved February 19, 1851. P. L., p. 28, sec. 2.

Power to extend the road, with provision "that company was to have all old power, and be subjected to all the duties, restrictions and liabilities contained in said acts."

Morris and Essex supplement of March 3, 1854. P. L., p. 260.

Power given to widen road, and extend it to Passaic river, granting all the old powers,

"subject to all the other restrictions and limitations therein contained."

A further supplement to the act entitled "An act "relative to the Delaware and Raritan Canal "and the Camden and Amboy R. R. Trans- "portation Company," approved March 16, 1854. P. L., 1854; p. 387.

First section permits competing railroads, after 1869, without consent of companies. Two to six various modifications of the charter are made.

SECTION 7. *And be it enacted*, That this act shall take effect as soon as the joint board of directors of the said two companies, and the board of directors of each of the said companies respectively, shall certify their acceptance of this act as a supplement to and part of *the charter* of the said companies, under the hands of the president and secretary, and the corporate seal of the said joint companies, and of each of the said companies, respectively, and file the same in the office of the Secretary of State of this State, who, in such case, shall cause a certified copy of such certificate of acceptance to be published in connection with this act, among the laws of this State, which publication shall be deemed competent and plenary evidence of such acceptance; and in case such certificate of acceptance be not filed within three months from the passage of this act, then this act shall be void.

Approved March 16, 1854.

Acceptance is on p. 551 of P. L. of 1854, as follows:— In compliance with the requisitions of the seventh

section of the act entitled "A further supplement to the act entitled 'an act relative to the Delaware and Raritan Canal, and the Camden and Amboy Railroad and Transportation Companies,'" the following certified copy of the acceptance of the provisions of said law by the said companies is here published:—

Whereas, the legislature of the State of New Jersey did, on the sixteenth day of March, in the year of our Lord eighteen hundred and fifty-four, pass an act entitled "A further supplement to the act entitled 'an act relative to the Delaware and Raritan Canal, and the Camden and Amboy Railroad and Transportation Companies;'" *and whereas*, the seventh section of the said act enacts "that this act shall take effect as soon as the joint board of directors of the said two companies, and the board of directors of each the said companies, respectively, shall certify their acceptance of this act as *a supplement to and part of the charter of the said companies*, under the hands of the President and Secretary, and the corporate seal of the said joint companies, and of each of the said companies respectively, and file the same in the office of the Secretary of State of this State, who, in such case, shall cause a certified copy of such certificate of acceptance to be published in connection with this act, among the laws of this State, which publication shall be deemed competent and plenary evidence of such acceptance; and in case such certificate of acceptance be not filed within three months from the passage of this act, then this act shall be void."

Be it, therefore, hereby certified, That the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad and Transportation Company, do accept this said act as a supplement to, and part of the charter of said companies.

Witness the hands of the President and Secretary, and the seal of the said joint companies, and the hands of the President and Secretary, and the seal of the Delaware and Raritan Canal Company, and the hands of the Pres-

ident and Secretary, and the seal of the Camden and Amboy Railroad and Transportation Company, this seventeenth day of April, one thousand eight hundred and fifty-four.

JOHN L. McKNIGHT, [L.S.]
President of the Joint Board.

JAS. C. GREEN, *Secretary of Joint Board.*

R. F. STOCKTON, [L.S.]
President Del. and Raritan Canal Co.

J. R. THOMSON, *Secretary D. and R. Canal Co.*

ROBT. L. STEVENS, [L.S.]
President C. & A. R.R. and Trans. Co.

SAMUEL J. BAYARD, *Sec. C. & A. R.R. and Trans. Co.*

Endorsed.

Filed June 1, 1854.

Morris and Essex supplement of March 6, 1855.
P. L., 177,

Gives power to build a branch road to Phillipsburgh, on Delaware river, and company was invested—for the purpose of constructing the branch—with all powers given by original charter.

> "and subjected to all the duties, restrictions and limitations contained therein;" and "provided, nevertheless, that nothing in this act shall be taken or construed to exempt or release the said company from taxation on their said road, as constructed under the original act, to which this is a supplement, or on the continuations of the said road, as constructed under and by virtue of the several supplements to the said original act, or on the branch road permitted to be constructed under and by virtue of this act, according to the true intent and meaning of the said original act, and of the several supplements thereto."

Morris and Essex supplement of March 6, 1857. P. L., p. 111,

Gives power to extend the road to New York Bay, and by the 7th section the company was—for the purpose of carrying into effect the objects of the act—invested with all the powers of original act and supplements, and

> "subjected, in respect to said road and the construction and use thereof, to all the duties, responsibilities, restrictions and provisions coutained in said *acts*."

Supplement of Morris and Essex Company, of March 13, 1861. P. L., p. 314.

Extending the time for completing the road to Phillipsburgh; altering the points from and to which the lateral roads before authorized might be built, and company was for those purposes invested with all the powers granted by the original charter and supplements, and

> "also subjected to all the duties, responsibilities, restrictions and provisions contained in said *acts*."

1862.

On March 28, 1862 (P. L., p. 344), a *general tax act* was approved. By Section 8 it was enacted—

> "That all private corporations of this State, except those which by virtue of any *irrepealable* contract in their charters or other contracts with this State, are expressly exempted from taxation, shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in, and accumulated surplus."

By Sec. 13 it was enacted—

"That the real estate of private corporations situate within this State shall be assessed to said corporation in the township or ward in which it is located, in the same manner as the real estate of individuals; *and the amount of such assessment shall be deducted* from the amount of the capital stock," &c.

The 21st section expressly repealed all

"acts and parts of acts, whether special or local, or otherwise, inconsistent with the provisions of this act."

1864 to 1872.

An act to incorporate the Pemberton and Hightstown Railroad Company. Laws 1864, p. 469, sec. 17.

And from and after the said railroad, or any part thereof, shall be in operation, the said corporation shall pay to the Treasurer of this State a tax of one-half of one per centum on the *capital stock* of said road, to be paid annually thereafter on the first Monday in January of each year, and such other State tax as may be assessed from time to time by a general law, applicable to all railroads over which the legislature shall have power for that purpose at the time of the passage of such law or laws.

The following acts contain the clause about the rate of tax—and also the clause which follows it, above, that is to say—the clause :—

"And such other taxes as may be assessed from time to time by a *general* railroad law, applicable to all railroads *over which the legislature shall have power* for that purpose."

is contained in the charters or supplements following:—

Rocky Hill road (P. L., 1864, p. 654); the Pemberton road (P. L., 1864, p. 469); with the Bridgeton road; the Red Bank; Monmouth & Middlesex (P. L., 1865, p. 548 and 683); Camden & Burlington; Swedesboro'; Mount Hope (P. L., 1866, pp. 19, 96, 465); the Farmingdale (P. L., 1867, p. 574); the New York & Long Branch (P. L., 1868, p. 852); the Ferromonte (P. L., 1869, p. 601); New Egypt (P. L., 1869, p. 472); the Newark & Hudson; Mercer & Somerset (P. L., 1870, pp. 1280, 913); the May's Landing R. R. (P. L., 1871, p. 678), and the Bound Brook (P. L., 1872, p. 314).

1865.

A further supplement to the act entitled "An act to incorporate the Morris and Essex Railroad Company," passed January twenty-ninth, eighteen hundred and thirty-five. P. L., p. 555.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That it shall be lawful for the Morris and Essex Railroad Company, and they are hereby authorized in completing their railroad and adapting the same to the business of transporting coal and other produce, to lay out and construct a branch railroad to connect with their main railroad at or near the vicinity of Denville, and thence by way of Boonton or its vicinity through the Great Notch in First Mountain, and thence to connect with some point of their main road east of said mountain, or with the Bloomfield Railroad, or both, with power to construct a branch railroad to Paterson, or the vicinity thereof; and that for these purposes they shall have power to enter upon and take lands, and exercise all rights, powers and franchises conferred upon them by their original act of incorporation, and the several supple-

ments thereto, with regard to their main road and its several branches, subject, however, to all the restrictions, limitations and conditions of said original act and supplements, which may be applicable to the powers and franchises hereby conferred.

2. *And be it enacted*, That in constructing the branch railroad, authorized in the said first section of this act, if it should be desirable for the purpose of getting better grades, that the same, or the main line of said company should cross the Passaic river further North than the present bridge of said company at Newark, it shall be lawful to construct a bridge or viaduct for such crossing, not nearer the present bridge of said company at Newark than Mill Brook, subject to all the conditions with regard to a draw therein as are imposed in the supplement to said act of incorporation, which was passed in the year eighteen hundred and fifty-seven, authorizing said company to extend their railroad to the Hudson river; *provided* said railroad shall cross the river road in Hudson County by a viaduct.

3. *And be it enacted*, That the tax of one-half of one per cent. provided by their said original act of incorporation, to be paid by the said company to the State whenever the net earnings of the said company amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburgh, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this State, or any law thereof; *provided* that this section shall not go into effect or be binding upon the said company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the Secretary of State, shall have signified its assent hereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void.

4. *And be it enacted*, That the track of the said Morris

and Essex Railroad, or its branches, and the track of the Paterson and Newark Railroad Company or its branches, shall not at any point cross each other upon the same level, and the track last laid shall pass over or under the track of the other road upon such a grade as will permit the locomotives and cars of the other company to pass without obstruction.

5. *And be it enacted*, That this act shall take effect immediately.

Approved March 23, 1865.

1865.

Certificate of assent of the Morris and Essex Railroad Company to a "further supplement to the act entitled 'An act to incorporate the Morris and Essex Railroad Company, passed January twenty-ninth, eighteen hundred and thirty-five." P. L, pp. 961, 962.

The Morris and Essex Railroad Company, to all whom it may concern:—These presents, duly executed under the corporate seal of the said company, are to certify and make known that, whereas, by an act of the Legislature of the State of New Jersey, approved on the twenty-third day of March, in the year eighteen hundred and sixty-five, entitled "A further supplement to the act entitled 'An act to incorporate the Morris and Essex Railroad Company,' passed January twenty-ninth, eighteen hundred and thirty-five," it was, amongst other things, in and by the third section thereof, enacted "that the tax of one-half of one per cent., provided by their said original act of incorporation, to be paid by the said company to the State whenever the net earnings of the said company amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from

the time when the road of the said company shall be open and in use to Phillipsburgh, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this State, or any law thereof; provided, that this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the Secretary of State, shall have signified its assent hereto; which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

And whereas, the said Morris and Essex Railroad Company hath received a copy of the said act, and considered the same,—

Now, therefore, these presents and this instrument are to certify and make known, and the said "The Morris and Essex Railroad Company," in said act mentioned and referred to, doth hereby declare that the said company, in consideration of the terms and conditions of the said supplement, and more especially of the third section thereof, has assented, and does hereby assent to the said act approved as aforesaid, on the twenty-third day of March, in the year eighteen hundred and sixty-five, and has agreed, and does hereby agree to be subject to the provisions of the said act, and to pay the tax therein named, as therein specified. In witness whereof the said company has hereto caused its corporate seal to be affixed, and the signature of its President to be subscribed, and the execution hereof to be attested by its Secretary this seventeenth day of April, in the year of our Lord one thousand eight hundred and sixty-five.

WM. WRIGHT, President. [Seal.]

Attest:

WM. VANDERPOEL,
Secretary M. & E. R. R. Co'y.

Filed April 24th, 1865.

W. S. JOHNSON, Sec'y of State.

1866.

Supplement to Jersey City Charter of 1866, P. L., p. 879, 880, approved March 29, 1866.

Proviso of section 2d—

"Provided, however, that no real or personal estate owned in said city shall be exempt from taxation, except mortgages on real or personal property therein, which shall be exempt from taxation in the hands of any citizen of this State."

General Tax Act of 1866.

Approved April 11, 1866.

Nixon's Digest, p. 951, p. 968, P. L. 1,091

Sec. 32 repeals many acts, including the General Tax Act of 1862, and then says:

"And all other acts, or parts of acts, whether special, "local or otherwise inconsistent with the provisions of "this act be, and the same are hereby repealed, *except* an "act entitled, &c., and such special or local acts as shall "have been approved *since the year eighteen hundred and "sixty-two; provided that the supplement* to the charter "of Jersey City, approved March 29, 1866, and the acts "and parts of acts thereby reinstated shall not be affected "by this act."

1867.

A further supplement to an act entitled "An Act to incorporate the Morris and Essex Railroad Company," passed January twenty-ninth, eighteen hundred and thirty-five. P. L., p. 144.

Whereas, the said Company have lately extended their

railroad by means of a branch road from Hackettstown to Phillipsburgh, where it is to connect with certain railroads of Pennsylvania, which extend to the coal fields of of that State; *and whereas*, the said Company have been making preparations for the transportation of coal across their road, by purchasing locomotives and other rolling stock, and by improving, straightening and relaying their said road in divers places, and laying down additional tracks and sidings; *and whereas*, other improvements of like character are still necessary to be made, and more capital will be needed therefor by the said company; therefore,

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That the said Morris and Essex Railroad Company be and they are hereby authorized to increase their capital stock to any amount not exceeding in the whole ten millions of dollars, including the amount heretofore authorized to be issued; which increase of stock hereby authorized shall be subscribed for and issued at such times and amounts, and in such manner and upon such terms as the board of directors of said company may deem expedient and proper; provided, that the amount of stock which may be issued upon and for any of the convertible bonds of said company, bearing date the first day of July, eighteen hundred and sixty-six, and secured by the second mortgage of said company, or upon and for any other convertible bonds which may be issued under second mortgage, shall be reckoned as part of the said ten millions of dollars.

2. *And be it enacted*, That the said company, in order to straighten their said railroad, or to reduce the grades thereof, or to make the necessary sidings or other facilities for railroad purposes, may change the line of said road or widen the same at any point or points, and may lay additional tracks and sidings and make other improvements and facilities for attaining the objects of their charter and the several supplements thereto; and for this purpose shall be invested with all the powers con-

ferred by the said charter and supplements, subject to the duties and liabilities thereby imposed; provided, that if any portion of the line of said road shall be changed as herein authorized, such new line or road shall not at any point thereof be located at a greater distance than three miles from the present line; and provided further, that no part of the present line shall be taken up or abandoned, notwithstanding the making of such new line, unless the said company shall file in the office of the Secretary of State a certificate under their corporate seal, declaring their purpose so to take up and abandon the same, and surrendering all their franchises in and over the part so to be taken up and abandoned; provided further, that in widening any part of said line the same shall not in any case be widened more than eight rods beyond its present or its authorized width, unless by express agreement with the owner or owners of the land required for that purpose, but nothing herein contained shall be construed as depriving said company of any powers they now have of taking or purchasing lands for the purposes of their charter, or of any of the supplements thereto.

3. *And be it enacted*, That no tax by or under the authority of this State shall be imposed upon any property purchased, held or used by said company for the purposes of their charter or any of the supplements thereto, except the tax of one-half of one per centum on the cost of their road, which, by the said charter and the supplement thereto, approved on the twenty-third day of March, eighteen hundred and sixty-five, was required to be paid by said company in lieu of all other taxes, any act to the contrary notwithstanding.

4. *And be it enacted*, That this act shall take effect immediately.

Approved March 5, 1867.

1869.

An act to validate and confirm a certain lease and contract, by which the Morris and Essex Railroad Company lease their roads to the Delaware, Lackawanna and Western Railroad Company, a corporation of the State of Pennsylvania. P. L., p. 28.

Whereas, The Morris and Essex Railroad Company has made and executed a certain lease and contract unto and with the Delaware, Lackawanna and Western Railroad Company, a corporation existing by and under the laws of the State of Pennsylvania, bearing date the tenth day of December, eighteen hundred and sixty-eight, by which lease and contract the railroads, property and franchises of the said, the Morris and Essex Railroad Company have been demised and leased unto the said, the Delaware, Lackawanna and Western Railroad Company, upon certain terms, conditions and rents, in said lease and contract set forth; and whereas it is deemed advisable and proper that the said lease and contract should be validated and confirmed; therefore,

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That the said lease and contract, and all the provisions, conditions, covenants and agreements therein contained, be and they are hereby validated and confirmed in all things, and said companies are hereby fully authorized and empowered, respectively, to carry out and perform the said lease according to the terms, conditions and stipulations thereof; and the said, the Delaware, Lackawanna and Western Railroad Company, is authorized and empowered to have, hold, use, enjoy, possess and exercise all and singular the property, things, franchises, immunities, rights, powers and privileges by said lease and contract granted, leased, or demised to them, and to work said railroad

and all its branches, to construct and use the branches and tracks in said lease and contract agreed to be built, in the manner and upon the conditions, in all respects and not otherwise, as authorized, directed and imposed in and by the act of incorporation of the said the Morris and Essex Railroad Company, and the supplements thereto, and generally to do all things by said lease and contract agreed by them to be done, as far as legal authority is necessary to them therefor; and it shall be lawful for the said corporations, and each of them, to make, execute and deliver to each other any other contracts or legal instruments, necessary or advisable the more effectually to carry out the general intent of said lease and contract, and the said the Delaware, Lackawanna and Western Railroad Company, by reason of the said lease, shall be, and it is hereby declared liable for all claims, debts, damages and penalties incurred in, or rising from the operating of said railroad or branches, and carrying freight and passengers on the same, as fully as the said the Morris and Essex Railroad Company is now liable by the laws of this State; and the said, the Delaware, Lackawanna and Western Railroad Company is, and is hereby declared liable to do and perform all acts and things which the said, the Morris & Essex Railroad Company, as owners of the property and franchises demised by said lease and contract, would be bound by law, to do and perform, had the said lease and contract not been made and confirmed; provided that nothing contained in this act shall prevent the Legislature from having the same control and authority over the property and franchises leased, as aforesaid, that they now have over the Morris and Essex Railroad Company.

2. *And be it enacted*, That the act entitled "A further supplement to the act entitled 'an act to incorporate the Morris and Essex Railroad Company,'" passed January twenty-ninth, eighteen hundred and thirty-five, which act was approved February, fifteenth, eighteen hundred and sixty-six, be and the same is hereby repealed.

3. *And be it enacted*, That this act shall be deemed a public act, and shall take effect immediately.

Approved February 9, 1869.

1869.

An act relative to transit duties. P. L., p. 226.

1. *And be it enacted by the Senate and General Assembly of the State of New Jersey*, That from and after the passage of this act, all transit duties, whether on passengers or freight, shall be deemed, and they hereby are abolished.

2. *And be it enacted*, That all companies heretofore paying transit duties to the State, shall hereafter pay each year, in quarterly payments, as heretofore, to the Treasurer of this State, a tax of one-half of one per centum upon the costs of their respective works, including all their property of every description not otherwise taxed, until the Legislature shall, by general law, impose a uniform State tax, equally applicable to all railroad and canal corporations of this State, and said companies shall then pay such uniform tax; and until such general law be passed, no company heretofore paying transit duties as aforesaid shall, in any year hereafter, pay a less sum as tax to the State than that paid by it for taxes and duties of all kinds for the year eighteen hundred and sixty-eight, and said amounts shall be paid by them in equal quarterly payments, and no other tax or impost shall be levied or assessed upon said companies.

3. *And be it enacted*, That this act shall not apply to any corporation having a contract with this State in reference to taxation, unless, within three months from the passage hereof, this act and its provisions be accepted by the board of directors of such corporation in place of said contract, and a certificate of such acceptance, under

the corporate seal of such corporation, be filed in the office of the Secretary of State, which certificate, or a duly certified copy thereof, shall be plenary evidence of such acceptance; and until the filing, as aforesaid, of such acceptance, such corporation shall pay as now required by law.

4. *And be it enacted*, That this act shall take effect immediately.

Approved March 4, 1869.

1869.

[P. L., pp. 1487–8.]

To all whom these Presents shall Concern:

Whereas, The Legislature of New Jersey, at its late session, passed an act entitled "An act relative to transit duties," which was approved on the fourth day of March, in the year eighteen hundred and sixty-nine; and whereas, the joint board of directors of the united Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, did, on the eleventh day of March last, adopt the following preamble and resolutions—that is to say:

"*Whereas*, An act was passed by the Legislature of this State, and approved on the fourth day of March, instant (1869), entitled 'An act relative to transit duties,' by the third section of which it is declared that this act shall not apply to any corporation having a contract with this State in reference to taxation, unless, within three months from the passage thereof, this act and its provisions be accepted by the board of directors of such corporation in place of said contract, and a certificate of such acceptance, under the corporate seal of such corporation, be filed in the office of the Secretary of State; therefore,

"*Resolved*, That the united companies—to wit, the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company—accept the said act, and each and every provision thereof, in lieu of all existing arrangements and laws for the taxation of the said companies, and each and every of them.

"*Resolved*, That a certificate of said acceptance be made, under the corporate seals of the said companies respectively, and filed in the office of the Secretary of State of this State, according to the terms and require ments of said act.

"Now, therefore, in pursuance of the requirements of the said act, and in pursuance of the said resolutions, it is hereby declared by the said United Companies, that is to say, the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, that the said companies do accept the said act of the Legislature of New Jersey, and each and every provision thereof, in lieu of all existing arrangements and laws for the taxation of the said companies, and each and every of them, and of all contracts with the said State therefor.

"In witness whereof the said companies have hereto caused their several corporate seals to be affixed, and the signatures of their several presidents to be subscribed this nineteenth of April, in the year of our Lord one thousand eight hundred and sixty nine.

"WM. H. GATZMER,
"*President.*

{Corporate Seal, Camden and Amboy Railroad and Transportation Company.}

"Attest—SAM'L J. BAYARD,
"*Secretary.*

"R. F. STOCKTON,
"*President.*

{Corporate Seal, the Delaware and Raritan Canal Company.}

"Attest—JOHN P. STOCKTON,
"*Secretary.*

"A. L. DENNIS,
"*N. J. R. R. and Trans. Co.*

{Corporate Seal.}

"Attest—FRED. W. RANKIN,
"*Sec'y N. J. R. R. and Trans. Co.*"

Endorsed, "An acceptance by the United Companies of the Transit Duty Act."

"Filed May 5th, 1869.

"H. N. CONGAR,
"*Sec'y of State.*"

STATE OF NEW JERSEY, *ss:*

I, Horace N. Congar, Secretary of State of the State of New Jersey, do hereby certify the foregoing to be a true copy of a paper purporting to be an "Acceptance by the United Companies of the Transit Duty Act," as the same is taken from, and compared with the original filed in my office on the fifth day of May, A. D. eighteen hundred and sixty-nine, and now remaining on file and of record therein.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Trenton, this
[L. S.] fifth day of May, A. D. eighteen hundred and sixty-nine.

H. N. CONGAR.

1873.

General Tax act, 1873. P. L., p. 112.

An act to establish just rules for the taxation of Railroad Corporations, and to induce their acceptance and uniform adoption.

Whereas, for the encouragement of railroad enterprise, laws creating and regulating railways in this State, usually provide for the payment by them, in consideration of their chartered privileges, of a fixed rate upon their capital stock or the cost of their works, in lieu of all

other public impositions, whatever; and *whereas*, it is nevertheless contended that the property of such corporations being largely acquired for, or through the growth and extension of their property, should contribute to the charges and expenses essential for municipal and county purposes; and, *whereas*, it is desirable in order to the avoidance of litigation and future dissatisfaction that such municipal and county taxation shall be authorized, and that the same shall be permanently fixed and regulated; now, therefore—

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That all taxation upon all railroad companies occupying and using railroads in this State, whether as lessees or otherwise, shall hereafter be made as follows: First, such companies shall pay upon the cost, equipment and appendages of such railroads respectively, a State tax after such rate of taxation as may have heretofore been fixed by law upon such companies, or in default thereof, after the rate of one-half of one per centum upon such cost. Second, upon all the real property by them, as aforesaid, occupied, used or owned for the purposes of their road, or otherwise, excepting their main stem or road-bed and track, not exceeding one hundred feet in width, such companies shall pay a county and municipal tax for the benefit of the counties, townships and cities, respectively, where the same is situate, after the rate of one per centum upon a valuation thereof, and of all improvements thereon, not by way of repairs, now or hereafter to be made, which valuation shall be made as hereinafter stated; provided, however, that at the terminus of their said roads each company may hold a tract of land not exceeding ten acres, to be in one parcel, which, with the buildings and improvements thereon, shall be free from the payment of county, township, and municipal taxes whatsoever.

2. *And be it enacted*, That on or before the first day of January, in each year, the president of every railroad corporation shall, on oath or affirmation, make return to

the comptroller of this State, of the cost of said road, and cost of the equipment and appendages of said railroad used by or belonging to said corporations in this State respectively, specifying the items and locality thereof, and further showing the cost of said property whereon said State tax is laid as aforesaid, specifying its particular items and their cost; and thereupon, within ninety days after such return, payment shall be made by the said company of the said tax to said treasurer; in default of which payment, remedy may be had therefor by suit.

3. *And be it enacted*, That if the State Comptroller shall be dissatisfied with any statement and return aforesaid, it shall be lawful to bring suit in the Supreme Court in the name and for the use of the State, against such corporation making such return as for a false return, and to recover in such action, upon proof thereof, the tax aforesaid due upon any property or cost or erroneously stated, and that whether or not payment has been made according to such erroneous return and statement; provided, that no such action shall be brought after the expiration of six months from the day of making such statement and return to such State Comptroller, and that costs shall be recovered by the successful party therein, as in all civil cases.

4. *And be it enacted*, That on or before the close of the legislative session in every year, the Governor shall appoint some responsible citizen of the State, commissioner of railroad taxation, to hold office for the space of one year, whose duty it shall be to make, certify under his hand, and return to the said Comptroller a statement and valuation of all the said property occupied, used or owned by or for the purposes of any railroad corporation in any county, city, or township in this State, and hereby made subject to county, township and municipal taxation, particularly specifying the same and stating also the township or city wherein the same is situate; such returns and statements shall be made separately for each railroad

corporation, and arranged by counties, townships and municipal subdivisions in such a manner as to be of easy reference, and shall be recorded in books in the office of said State comptroller, to be provided by him for that purpose, and shall be public records, subject to public inspection.

5. *And be it enacted*, That before making such valuation and assessment, said commissioner shall give written notice to said railroad corporation, and each township or municipality interested respectively for at least ten days of the time and place at which he will proceed to perform said duty; such notice to be served in the manner provided by law for serving writs or summons upon such corporations, and shall then and there, or at such other time as he shall then and there, or on any other adjourned day, appoint, judicially fix such valuation, of which such return shall be the evidence, and from which there shall be no appeal.

6. *And be it enacted*, That nothing in this act shall be held to require that such valuation shall be made by such commissioner of the said property taxable for county, township and municipal purposes belonging to any particular railroad corporation, oftener than once in three years, and that after the first of such valuations is made no other shall be made for the space of three years thereafter; during said intervening period such valuation shall be final, and said tax of one per centum thereon shall be annually paid thereon to the collectors of the various townships or cities in which said property is situate, as if the same had been laid under the tax laws governing the same; all laws for the collection of ordinary taxes in any such township or city shall be applicable, so far as possible, to the collection of the tax hereby authorized, or the same may be collected by suit; and it is hereby declared to be the intent hereof, that valuations, in manner aforesaid, of the property of each railroad corporation in this State, for the purpose of county and municipal taxation, shall be made once every three years, but not oftener, and that

every such valuation shall be the basis of such taxation yearly, during the intervening period.

7. *And be it enacted*, That said returns by said Commissioner shall be made prior to the first day of July, in every year, and that the said tax thereon shall be payable within thirty days thereafter.

8. *And be it enacted*, That the said Commissioner shall receive a salary of one thousand dollars per annum, payable quarterly, and in the manner as other State officers are paid.

9. *And be it enacted*, That all railroad corporations shall be liable for city improvements, beneficial to such property for the purposes for which it is used by the said company, except that hereby made subject to State tax; provided, that nothing in this or any act shall have the effect to alter any law now existing in relation to such improvements.

And whereas, Certain railroad corporations, owning or occupying railroads in this State, claim exemption from all taxation, whether State, county or municipal, further than is provided for by their charters, or by special laws for their benefit now existing, which claims, even if legal, subject said corporations to public ill-will, and make it their interest to forego the same and agree to the scheme of taxation hereby established; now, therefore,

10. *Be it enacted*, That any such railroad corporation may, within six months from the approval of this act, make and execute, under their common seal, and the signature of their president, and file in the office of the Secretary of State, a declaration in writing, surrendering all claim to exemption from taxation by them heretofore had or made, and accepting the provisions of this act in lieu thereof.

11. *And be it enacted*, That all acts and parts of acts inconsistent herewith shall be and the same are hereby repealed.

12. *And be it enacted*, That this act shall take effect immediately.

Approved April 2, 1873.